22-180

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. ~~428.~~ 142

THE UNITED STATES, APPELLANTS,

vs.

C. V. WOODRUFF AND A. BOUCHARD, JULIA A. NUTT, EXECUTRIX OF HALLER NUTT, MARY A. WELLS, ET AL.

No. ~~424.~~ 143

BESSIE ELGEE GAUSSEN, EXECUTRIX OF JOHN K. ELGEE, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

No. ~~449.~~ 166

C. V. WOODRUFF & COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

No. ~~515.~~ 228

JULIA A. NUTT, EXECUTRIX OF HALLER NUTT, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

NOS. 423 & 424, FILED APRIL 9, 1873. NO. 449, FILED JULY 11, 1873. NO. 515, FILED OCTOBER 11, 1873.



SUPREME COURT OF THE UNITED STATES.

No. 423.

THE UNITED STATES, APPELLANTS,

vs.

C. V. WOODRUFF AND A. BOUCHARD, JULIA A. NUTT, EXECUTRIX OF HALLER NUTT, MARY A. WELLS, ET AL.

No. 424.

BESSIE ELGEE GAUSSEN, EXECUTRIX OF JOHN K. ELGEE, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

No. 449.

C. V. WOODRUFF & COMPANY, APPELLANTS,

vs.

THE UNITED STATES.

No. 515.

JULIA A. NUTT, EXECUTRIX OF HALLER NUTT, DECEASED, APPELLANT,

vs.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

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1 *Amended petition filed by leave.—Filed Jan'y* 13, 1868.

In the Court of Claims.

CORNELIUS V. WOODRUFF AND ADOLPH BOUchard
vs.
THE UNITED STATES. } No. 2157.

To the honorable the judges of the Court of Claims:

Your petitioners, Cornelius V. Woodruff and Adolph Bouchard, who are citizens of the United States, residing in the city of New Orleans and State of Louisiana, respectfully represent to your honors:

That, prior to and in the month of March, in the year eighteen hundred and sixty-four, they were partners, trading and doing business in said city and State, under the name and style of C. V. Woodruff & Co.; that, in said month of March, in the year last aforesaid, they owned and had in possession, in the county of Wilkinson and State of Mississippi, in charge of a special agent, about two thousand one hundred bales of cotton, which cotton was then situate on a bayou called Buffalo Creek, about three miles inland from the Mississippi River, and about sixty miles below Natchez, in said county and State aforesaid.

Your petitioners further represent that, on the 3d day of April, in the year eighteen hundred and sixty-four, they applied to R. S. Hart, esq., special Treasury agent of the United States at Natchez, for a permit to remove said cotton, the same being then within the military lines of the United States, in order that they might carry and transport the same to New Orleans, a place also then within said military lines; and thereupon said Treasury agent granted said permit, your petitioners having given bonds and complied in all respects with the regulations of the Treasury Department in such cases made and provided.

2 Your petitioners further represent that, afterwards, to wit, some time in the month of April, in the year eighteen hundred and sixty-four, one B. F. Camp, who was not officially connected with the military or the naval forces of the United States, and who was not acting under the authority or order of either, or any officer or commander of either, and without the knowledge or consent of, and without lawful authority from, your petitioners, unlawfully and fraudulently took five hundred and eighty-two bales of the said cotton of your petitioners, so situate as aforesaid, in charge of their special agent, and carried the same away from the place aforesaid, where the same had been left by your petitioners, in said Wilkinson County, in the charge and under the exclusive control of petitioners' said agent; and said B. F. Camp caused said five hundred and eighty-two bales of cotton to be laden on the steamboat Venango, which carried the same to Natchez, in said State of Mississippi, where said cotton, in said month of April, was delivered by said Camp to and taken possession of by R. S. Hart, special agent of the Treasury Department of the United States, as abandoned property.

Your petitioners further represent that said R. S. Hart, Treasury agent aforesaid, caused said five hundred and eighty-two bales of cotton to be carried and transported to St. Louis, in the State of Missouri, and there, in the port of St. Louis aforesaid, said Treasury agent caused said five hundred and eighty-two bales of cotton, the property of your petitioner as aforesaid, to be sold for money; which sale produced the

gross sum of three hundred and ninety thousand dollars; and said sum of money was paid into the Treasury of the United States, and was claimed to be held by said Treasury agent, and to be so paid into said Treasury, the proceeds of said cotton, as abandoned property, under the terms of the act of Congress, entitled "An act to provide for the collection of abandoned property, and for the prevention of frauds in insurrectionary districts within the United States," approved March 12, 1863; and petitioners aver that said sum of money is now, and has ever since been, and still does remain, in said Treasury of the United States.

Your petitioners further represent that they are the owners of said cotton, and were when it was so unlawfully and fraudulently seized by said Camp; that they are lawfully entitled to said sum of three hundred and ninety thousand dollars, so received by said Treasury agent and paid into the Treasury of the United States as aforesaid, less
3 the expenses of transportation and sale of said cotton, which sum of money is wrongfully withheld from your petitioners by the United States in manner aforesaid.

Your petitioners further state that they are the sole owners of said claim, and that they have at all times borne true allegiance to the Government of the United States, and they have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against the United States Government.

JOHN A. GROW,
R. M. CORWINE,
R. J. ATKINSON,
Solicitors for Claimants.

UNITED STATES OF AMERICA,
District of Columbia:

Adolph Bouchard, one of the above-named petitioners and claimants, deposes and says: That he believes the facts stated in the foregoing petition are true; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by said claimants; that he believes the claim is just, and the claimants entitled to the amount claimed in the petition from the United States, after allowing all just credits and offsets.

A. BOUCHARD.

Subscribed and sworn to before me, assistant clerk of the Court of Claims, this 8th day of January, A. D. 1868.

JNO. RANDOLPH.

Address of claimants and counsel:

ADOLPH BOUCHARD, *New Orleans, La.*
CORNELIUS V. WOODRUFF, *New Orleans, La.*
JOHN A. GROW, *New Orleans, La.*
R. M. CORWINE, *Cincinnati, Ohio.*
R. J. ATKINSON, *Washington City, D. C.*

4 *Amended petition.—Filed Jan'y* 12, 1869.

U. S. Court of Claims.

CORNELIUS V. WOODRUFF AND ADOLPH BONchard
vs.
THE UNITED STATES. } No. 2159.

To the honorable the judges of the Court of Claims:

Your petitioners, Cornelius V. Woodruff and Adolph Bonchard, the

claimants in this case, respectfully represent, in addition to the facts specifically set forth in the original and amended petitions filed in this case, that the proceeds of said 582 bales of cotton, sold at St. Louis, by directions of the Treasury agent of the United States, amounted to the gross sum of three hundred and ninety thousand dollars, which sum of money was invested in bonds of the United States Government, drawing interest at the rate of five per centum per annum in gold; that, since the filing of said amended petition, claimants are informed and believe that said bonds representing the proceeds of said cotton have been sold, and the proceeds, including the accrued interest thereon, have been paid into the United States Treasury to the credit of the "captured and abandoned property fund;" wherefore claimants pray the court that they may have judgment for the said accrued interest, in addition to the principal of said bonds, and any premium derived from the sale thereof, including the premium on the gold interest accumulated prior to the said sale and paid into the Treasury.

Petitioners further state that they have at all times borne true allegiance to the Government of the United States; that they have not in any way voluntarily aided, abetted, or given encouragement to the late rebellion against the United States, nor been connected with the military, naval, or civil service of the so-called confederate government, or any of the so-called Confederate States.

A. BONCHARD.

UNITED STATES OF AMERICA,
District of Columbia:

Adolph Bonchard, one of the above-named petitioners and claimants, being duly sworn, says that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; that said claimants are justly entitled to the amount therein claimed from the United States after allowing all just credits and offsets, and that he believes the facts stated in this petition are true.

A. BONCHARD.

JOHN A. GROW,
R. W. CORWINE,
R. J. ATKINSON,
Counsel.

Sworn and subscribed this 12th day of January, A. D. 1869, before me
JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Address of claimants and counsel:

ADOLPH BONCHARD, *New Orleans, La.*
CORNELIUS V. WOODRUFF, *New Orleans, La.*
JOHN A. GROW, " "
R. M. CORWINE, *Cincinnati, Ohio.*
R. J. ATKINSON, *Washington, D. C.*

6 *Petition.—Filed August* 19, 1868.

United States Court of Claims. December term, A. D. 1867.

JULIA A. NUTT, EXECUTRIX OF HALLER NUTT, deceased,
vs.
THE UNITED STATES.

To the honorable the Secretary of the Treasury:

The petition of Mrs. Julia A. Nutt, sole executrix of the estate of Haller Nutt, late of Adams County, in the State of Mississippi, deceased, respectfully shows:

That Haller Nutt, a citizen and resident of the county of Adams, and State of Mississippi, who was the husband of your petitioner, died on the 15th day of June, A. D. 1864, leaving a last will and testament, whereby, amongst other things, your petitioner was constituted and appointed executrix of the estate of said Haller Nutt; that afterwards, at a term of the probate court of said Adams County, begun and held at the court-house of said county, on the fourth Monday of April, A. D. 1866, the aforesaid will of Haller Nutt was duly proved, approved, and admitted to record in said court, and probate thereof was granted to petitioner, and your petitioner, having complied with the laws of the State of Mississippi in such case made and provided, was duly confirmed and qualified as executrix of the said estate, all of which will more fully appear by reference to the letters testamentary, issued on the 26th day of April, A. D. 1866, by the said probate court, under the seal thereof, of which a copy, duly certified, is herewith filed.

7 That said Haller Nutt, though a resident of an insurrectionary district, was, at the inception of the rebellion, and up to the day of his decease, loyal to the Government of the United States. In proof whereof your petitioner refers to the certificate of Major George C. McKee, first United States provost-marshal at Natchez, Mississippi, and to the letters, certificates, and orders of other officers of the United States Army, of which copies are herewith filed, the originals whereof are now on file in the United States Treasury Department, in the matter of the application heretofore made by petitioner, in her own right, for the restoration of the sum of $6,345.36, seized by William Burnett, assistant special agent of the Treasury Department at Natchez, Mississippi.

That said Haller Nutt, at the commencement of the late rebellion, was the owner of a large estate, real and personal, situated in the States of Mississippi and Louisiana; but, during the progress of the war, the depredations of the rebel forces and of civilians in sympathy with them, incited by the well-known Union sentiments of said Nutt, deprived him of a large portion of his personal property, to wit, of about five thousand (5,000) bales of cotton, whilst the Union forces, operating under General Grant for the reduction of Vick'burg, completed the destruction of his personal estate, by burning the balance of his cotton, about eight hundred (800) bales, and taking from his plantations, without remuneration to him, cattle, horses, swine, and products.

In view of these great losses, which had well-nigh reduced said Nutt to poverty, B'igadier-General Ransom, of the United States Army, who was the first Union commandant of the post of Natchez, after the fall of Vicksburg, and who was well assured of the loyalty of the said Haller Nutt, advised him to engage in the cotton trade, and offered to extend to him

such facilities for the purchase and shipment of cotton as might be compatible with his duties as a military officer.

Influenced by this advice, and in the hope of thereby, in some degree, repairing his losses, the said Haller Nutt prepared to buy and ship cotton. Having heard of a certain lot of cotton belonging to one John K. Elgee, situated on a plantation on or near the Homochitto River, in the State of Mississippi, which lot of cotton is hereinafter more particularly mentioned and described, he obtained the assent of the general commanding the forces at Natchez to his purchase of it, and, some time in the autumn of the year 1863, he procured from the proper military authorities a pass through the lines for Truman C. Holmes, his agent, for the purpose of purchasing this cotton from its owner.

8

Your petitioner further states the cotton in question, consisting of about twenty-one hundred (2,100) bales, was, at the date last mentioned, on the plantation of John K. Elgee and Josiah Chambers, situated in the county of Wilkinson and State of Mississippi, on or near the Homochitto River, or between the Homochitto and Buffalo Rivers.

The said Truman C. Holmes, as agent of the said Haller Nutt, passed through the lines of the Federal Army at Natchez, and proceeded to Alexandria, where he met John K. Elgee, the owner of the said cotton, with whom, on or about the 8th day of October, A. D. 1863, he concluded a contract for the purchase of said cotton, and the said John K. Elgee then and there executed, in writing, and delivered to the said Truman C. Holmes, a bill of sale, whereby he bargained, sold, and delivered to said Holmes the aforesaid lot of cotton, consisting of about twenty-one hundred (2,100) bales, situated and described as above mentioned, in consideration that said Holmes would pay to said Elgee, at the counting-house of Washington Jackson, at Liverpool, England, the sum of fifteen pounds sterling (£15) per bale for each and every bale which he, said Holmes, should thereafter safely get to market. And at the same time the said Elgee wrote, and delivered to said Holmes, to be by him delivered as addressed, a letter addressed to one W. C. Gordon, who was the overseer in charge of the plantation where the cotton was then situated, in which letter the said Elgee notified his overseer of the sale he had made of this cotton, and directed him to obey the instructions of said Holmes in relation to the same.

Your oratrix further states that, after the purchase of the cotton, as aforesaid, the said Truman C. Holmes went to the plantation where said cotton was situated, delivered to the overseer, Gordon, the letter of said Elgee, and took possession of the cotton; but as the rebel forces and scouts were at that time burning all cotton in transit to points in the possession of the National forces, he considered it unsafe to attempt to remove said cotton to market; wherefore he hired said Gordon to take care of the cotton. The said W. C. Gordon accepted the charge, and the cotton was placed in his custody.

9

And upon the return of said Holmes to Natchez, he assigned, in writting, and delivered to his principal, the said Haller Nutt, for whom the cotton was bought, the original bill of sale from John K. Elgee. All of which will more particularly appear from the affidavit of the said Truman C. Holmes, marked Exhibit A, herewith filed, reference being had thereto.

And your oratrix further states that the cotton so sold and delivered by said Elgee to said Haller Nutt remained in his quiet possession for several months after its purchase, and said Gordon, who, as his agent, had the care and custody of it, frequently communicated with said Nutt in reference to its condition and the prospect of removing it

That, in the autumn of *of* 1863, there was no assistant special agent of the Treasury Department at Natchez to grant permits for the shipment of products, but such permits were issued by the commanding general to persons who were known to be loyal, and to be the bona-fide owners of the products desired to be shipped, under and by virtue of "General Orders No. 57, Department of the Tennessee, September 22, 1863." On the 31st day of October, A. D. 1863, the aforesaid Haller Nutt applied at the headquarters of the United States forces, Natchez, and there was issued to him on that day, by order of Brigadier-General M. M. Crocker, then in command, a permit, numbered "139," which authorized and empowered him to ship, on his account, for sale, to New Orleans, Louisiana, the aforementioned lot of twenty-one hundred (2,100) bales, as will appear by reference to the affidavit, herewith filed, of C. Cadle, jr., who was then captain and assistant adjutant-general on the staff of Brigadier-General Crocker.

But the country about the Homochitto River was still thronged
10 with rebel scouts, and it was not deemed safe to attempt the removal and shipment of the cotton from the plantation.

Petitioner further states that, some time in the month of , A. D. 1864, certain parties, to your oratrix unknown, attempted, without the knowledge or consent of the said Haller Nutt, to take possession of said cotton, and did, unlawfully and forcibly, seize and carry off from the custody of the agent, Gordon, a portion of this cotton, amounting to about five hundred and seventy-two (572) bales, and loaded the same on a steamer, with the intention, as your petitioner was informed, of shipping the same to New Orleans. The said Haller Nutt, on being notified by his agent, Gordon, of this unlawful attempt, made complaint to Brigadier-General Tuttle, then commanding at Natchez, and to Ralph S. Hart, the then assistant special agent of the Treasury Department, and invoked their assistance. And petitioner states, upon information and belief, that, in consequence of such complaint, the cotton, so unlawfully seized and taken from the custody of the agent, Gordon, was brought to the port of Natchez, where it remained for some time in the charge of Assistant Special Agent Hart, to whom, upon being notified so to do, the said Haller Nutt exhibited his bill of sale, the letter from Elgee to Gordon, and shipping permit from General Crocker. But said Hart afterwards declined to decide the question of ownership, but shipped the cotton on Government account to St. Louis, Mo., where, as your oratrix is informed and believes, it was sold, and the proceeds of sale deposited in the United States Treasury.

And petitioner states that she does not produce the papers hereinbefore referred to, to wit, the bill of sale of said cotton, the letter from Elgee to Gordon, and the permit to ship, for the reason that they are not in her possession, and she does not know where they now are; that, about the time the cotton was shipped to St. Louis by the Treasury agent, Hart, as aforesaid, the said Haller Nutt employed one George B. Field, of the firm of Blossom, Riggin & Co., to receive said cotton for him, and for that purpose delivered said papers to the said Field.

11 Your petitioner states that said papers were last in the possession of said Field; that she has made diligent search to find him, but can learn nothing of him or of the papers.

Wherefore your petitioner prays that the proceeds of the cotton aforesaid, now in the Treasury, may be adjudged to belong to the estate of Haller Nutt, deceased, and may be delivered to petitioner as executrix of said estate; and, as in duty bound, your petitioner will ever pray, &c.

JULIA A. NUTT,
Executrix of the Estate of Haller Nutt, Deceased.

STATE OF MISSISSIPPI,
County of Adams, ss:

Personally appeared before the undersigned, Ro. J. Wood, clerk of the probate court of said county, Mrs. Julia A. Nutt, the above-named affiant, who is personally known to me, and who, being first duly sworn, on her oath says that the foregoing petition is true, except as to the matters and things therein stated on information and belief, and as to them she believes it to be true.

JULIA A. NUTT.

R. J. BRENT,
Solicitor for Mrs. Nutt.

Subscribed and sworn to before me this 4th day of December, A. D. 1866, as witness my hand and seal of said court.

RO. J. WOOD, *Clerk.*

THE STATE OF MISSISSIPPI,
Adams County, ss:

I, Reuben Bullock, judge of the probate court, do hereby certify that Robert J. Wood, whose genuine signature appears to the above certificate, is, and was at the day of the date thereof, clerk of the probate court of said county, duly elected, qualified, and commissioned; that his said certificate is in due form of law, and that all of his acts in the premises are and ought to be entitled to full faith and credit.

Given under my hand and seal, at Natchez, the 5th day of December, A. D. 1866.

R. BULLOCK. [L. S.]

12 *Petition.—Filed Feb.* 17, 1869.

United States Court of Claims. December term, A. D. 1868.

CORNELIUS V. WOODRUFF & ADOLPH BOUCHARD *vs.* THE UNITED STATES. } No. 2157.

Bill of interpleader.

Comes now Archibald Montgomery, a subject of Great Britain and a resident of the State of Louisiana, and by leave of the court first had and obtained, files this his bill of interpleader in the above-entitled cause.

And your petitioner states that, on the 9th day of February, A. D. 1864, he purchased of one J. K. Eglee, now deceased, then a resident and citizen of the said State of Louisiana, a lot of cotton, consisting of two thousand and thirty bales, which said cotton had been grown on the plantation of said Elgee, in Wilkinson County, in the State of Mississippi, between the Buffalo and Homochitto Rivers, and which was at the time of the said purchase stored under sheds on a bluff on Buffalo Bayou, under the charge of one William C. Gordon, as the agent of the said Elgee.

Your petitioner further states that, some time in the month of , 1864, one Benjamin F. Camp procured a steamboat by the name of Venango, and, proceeding to the place where the said cotton was stored,

without any right or authority, did seize about five hundred and eighty bales thereof, and carry the same to Natchez, in said State of Mississippi, alleging that the same was abandoned property, when, in fact, the said cotton had never been out of the possession of the said Elgee,
13 by his said agent, Gordon, nor the subsequent possession of your petitioner, by the same agent, as a purchaser from the said Elgee.

Your petitioner further states that, subsequent to said seizure and shipment of the said cotton by the said Camp, and after the same had been landed at Natchez, one W. P. Mellen, supervising special agent-general for the Treasury Department, ordered the said five hundred and eighty bales of cotton to be shipped to St. Louis, Missouri, where the same was sold, and the proceeds thereof deposited in the Treasury of the United States, and that the nett proceeds of said cotton, as your petitioner verily believes, amounted to the sum of three hundred and forty thousand dollars.

Your petitioner further states that, under and by virtue of the third section of the act entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States," approved March 12, 1863, as the owner of the said five hundred and eighty bales of cotton, he is entitled to receive the proceeds thereof "after the deduction of any purchase-money which may have been paid, together with the expense of transportation and sale of said property, and any other lawful expenses attending the disposition thereof," which net proceeds he alleges to amount to the said sum of three hundred and forty thousand dollars.

Your petitioner further states that he never at any time gave any aid or comfort to the late rebellion against the Government and authority of the United States, and has at all times strictly observed the duties of a neutral resident.

And your petitioner here denies that the said Cornelius V. Woodruff and the said Adolph Bouchard, or either of them, or any other person or persons, other than himself, are the owner or owners of the said cotton, or entitled to the proceeds thereof.

Wherefore, and in consideration of the premises, your petition prays judgment for the said sum of three hundred and ninety thousand dollars, the nett proceeds of the said cotton.

M. F. MORRIS,
WEED & CLARKE,
Sol's for Claimant.

14 DISTRICT OF COLUMBIA,
County of Washington, ss:

M. F. Morris, of lawful age, on oath deposes and says that he is the attorney in fact of the said claimant, Archibald Montgomery; that, to the best of his knowledge, information, and belief, no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made; that the said claimant, as he verily believes, is justly entitled to the amount claimed in said petition from the United States, after allowing all just credits and offsets; that he believes the facts stated in said petition are true.

M. F. MORRIS.

Subscribed and sworn to before me this 10th day of February, 1869.
JOHN F. CALLAN,
Comm'r Court of Claims.

Post-office address of claimant, New Orleans, La.
Post-office address of solicitors, Washington City, D. C.

15 *Filed Feb.* 16, 1869.

United Court of Claims. December term, 1868.

No. 2157. C. V. WOODRUFF AND ADOLPHE BOUCHARD *vs.* THE UNITED STATES.

3152. MARY ANNE WELLS AND OTHERS *vs.* THE UNITED STATES.

3203. CHARLES S. LOBDELL *vs.* THE UNITED STATES.

3223. ARCHIBALD MONTGOMERY *vs.* THE UNITED STATES.

3496. JULIA NUTT, EXECUTRIX, *vs.* THE UNITED STATES.

To the honorable the judges of the Court of Claims:

The petition of Mary Anne Wells, wife of James Madison Wells, and by him duly authorized to stand in judgment herein; of Clara M. Smith, wife of Dr. Stokes A. Smith, and by him duly authorized to stand in judgment herein; of Louisiana I. Isaacs, widow of A. I. Isaacs; of Catherine M. Jones, widow of Robert B. Jones; of Bessie Elgee Ganssen, wife of Edmond I. Ganssen, and by him duly authorized to stand in judgment, claiming both in her own right and as natural tutrix and natural guardian of her minor children, Thomas Scott, Matilda Scott, Mary Anne Scott, and Elgee Scott; and of Mary Eliza Fauntleroy, wife of Fauntleroy, and by him duly authorized to stand in judgment herein, respectfully represent that all your petitioners reside in the State of Louisiana, except Mrs. Bessie Ganssen and her minor children, who reside in Ireland; and except Mrs. Fauntleroy and her husband, who reside in the State of Virginia, and are citizens thereof; and except, further, Mrs. Louisiana I. Isaacs, who is a resident and citizen of the State of Kansas; and your petitioners aver that they are the only legal heirs and representatives of John K. Elgee and his wife, Mary E. Loulette, both deceased, and late of the State of Louisiana, where they resided during life.

16 And your petitioners further show that the aforesaid John K. Elgee died on or about the 14th day of October, 1864, at New Orleans, in the State of Louisiana, leaving a widow, Mrs. Mary F. Loulette Elgee, and two children, namely the above-named Mrs. Bessie Ganssen, an only child of the said John K. Elgee by a previous marriage, before his marriage with Mary F. Loulette, and Charles Ledoux Elgee, his only child by his second marriage with Mary F. Loulette; that, subsequently to the death of John K. Elgee, as aforesaid, his only son by his second marriage, Charles Ledoux Elgee, also died, leaving a widow, one of the present petitioners, Mrs. Fauntleroy, and leaving also a minor child named Frances Charles Elgee, his only child, who, subsequently to the death of her said father, also herself died, by which event her mother, the said Mrs. Mary Eliza Elgee, now Mrs. Fauntleroy, became by law the heir of the entire estate and property of the said deceased child, Frances Charles Elgee.

Your petitioners further represent that, after the death of the said Charles L. Elgee, and his only child, Frances Charles Elgee, as above set forth, and on or about the 1st day of November, 1867, the above-named Mrs. Mary F. Loulette Elgee, widow of the above-named John K. Elgee, died, in the State of Louisiana, leaving as her only legal

heirs and representative your petitioners, Mary Anne Wells, Clara M. Smith, Louisana I. Isaacs, and Catherine Jones, all above named children of the said Mary F. Loulette by her first marriage with Thomas C. Scott; and leaving also among her heirs and legal representatives her, the said Mary F. Loulette's, grandchildren, namely, Thomas Scott, Matilda Scott, Mary Anne Scott, and Elgee Scott, who are the children of Thomas F. Scott, born of his marriage with Bessie Elgee, now the above-named Bessie Ganssen, the said Thomas F. Scott having been the only son of the said Mrs. Mary F. Loulette by her first marriage with the aforesaid Thomas C. Scott, and the said Thomas F. Scott having died before his said mother.

Now, your petitioners further show that, on the 14th day of October, 1864, John K. Elgee, their ancestor aforesaid, died, possessed, amongst other large and valuable property, of five hundred and seventy-two bales of cotton, which had been produced on a plantation owned
17 by the said John K. Elgee, in the county of Wilkinson and State of Mississippi, being the same cotton which is described in your petitioners' petition against the United States, in the case No. 3152 on the docket in this honorable court; and being the same cotton described in the petition of C. V. Woodruff and Adolphe Bouchard vs. The United States, No. 2157 on the docket of this honorable court; and the same cotton as that described in the petition of Charles S. Lobdell vs. The United States, No. 3203 on the docket of this honorable court; and the same cotton that is described in the petition of Archibald Montgomery vs. The United States, being No. 3223 on the docket of this honorable court; and the same cotton that is described in the petition of Julia Nutt, executrix of Huller Nutt, being No. 3496 on the docket of this honorable court; that the said cotton so owned by their ancestor, John K. Elgee, at the period of his decease, was forcibly and illegally taken possession of by William P. Mellen, an agent of the Treasury Department of the United States, on or about the 2d day of April, 1864, under the false pretense that the cotton was abandoned property; and the said Mellen sent this cotton to St. Louis, where it was sold, and the proceeds, amounting to $400,000 and upwards, deposited in the United States Treasury; which proceeds are, by reason of the premises, the sole and exclusive property of your petitioners.

Now, your petitioners further show that Cornelius V. Woodruff and Adolphe Bouchard, lately trading and doing business in the city of New Orleans, and State of Louisiana, as commercial partners under the firm and style of C. V. Woodruff & Co., and one Charles S. Lobdell, and one Archibald Montgomery, and one Julia Nutt, executrix of Huller Nutt, have respectively filed petitions and instituted suits against the United States in this honorable court, each falsely and illegally pretending that he was the true and lawful owner of the aforesaid cotton at the time of its seizure, and each falsely and illegally pretending that he is the owner of, and entitled to be paid the proceeds of the sale of, said cotton, now in the Treasury of the United States, as above set forth; and that, by consequence of these conflicting claims, the respective petitioners above named, as well as these, your pe-
18 titioners, have been ordered by this honorable court to interplead and settle the matters in controversy among themselves.

Now, your petitioners respectfully represent that John K. Elgee, of the parish of Rapides, and State of Louisiana, was, at the date of his decease, as above set forth, the true and lawful owner of the aforesaid five hundred and seventy-two bales of cotton mentioned in the various petitions of the parties ordered to interplead; that he had never, under

any legal form of conveyance, or in any manner whatever, parted with his title to, and ownership of, said cotton; and that, after the sale thereof by the Treasury agents of the United States, the proceeds thereof vested in him, the said John K. Elgee, and in his legal heirs, your petitioners, by operation of law; and that none of the other petitioners, to wit, C. V. Woodruff & Co., Charles S. Lobdell, Archibald Montgomery, and Julia Nutt, executrix of Huller Nutt, have now, or ever had, any right, title, or interest in and to said five hundred and seventy two bales of cotton, or to the proceeds of the sale thereof, now in the United States Treasury.

Wherefore your petitioners pray, the premises being considered, that the said Cornelius V. Woodruff and Adolphe Bouchard, composing the commercial firm of C. V. Woodruff & Co., the said Charles S. Lobdell, the said Archibald Montgomery, and the said Julia Nutt, executrix of Huller Nutt, may have due notice of the filing of this petition, and ordered to answer thereunto within such time as may be deemed proper by the court, and after due proceedings, and that the claims set up by the said Woodruff & Co., Lobdell, Montgomery, and Nutt, adverse to these petitioners, be rejected, and that your petitioners be declared the true and lawful owners, to the exclusion of all others, of the said five hundred and seventy-two bales of cotton, and to the proceeds thereof, now in the Treasury of the United States. And they pray for all such other aid, relief, remedy, and process as the nature of their case may require, and law permit

THOMAS J. DURANT,
Attorney of Mary Anne Wells and others.

FEBRUARY 13, 1869.

19 *Bill of interpleader of Julia A. Nutt, executrix of Haller Nutt.—Filed Feb.* 11, 1869.

United States Court of Claims. December term, 1868.

The bill of Julia A. Nutt, executrix of Haller Nutt, respectfully sheweth: That she hath heretofore filed her petition in your honorable court, number 3496 on the general docket, to which she begs leave to refer as part of this bill; that, in and by her said petition, she claims, as executrix aforesaid, to be entitled to the proceeds of about five hundred and eighty-two bales of cotton, now in the Treasury of the United States, as will more fully appear by her said petition.

Your petitioner further sheweth that certain persons, to wit, Cornelius V. Woodruff, Adolph Bouchard, Charles S. Lobdell, Archibald Montgomery, Mary A. Wells, and others claiming the identical same cotton or the proceeds thereof for themselves, and adversarily to your petitioner, as will more fully appear by reference to their respective petitions, filed as numbers 2157, 3203, 3223, and 3152 on the general docket of your honorable court, which petitions and each of them are prayed to be taken as part hereof, to show said adversary claims.

Your petitioner, in obedience to the order of this honorable court, files this, her bill of interpleader, claiming the proceeds of said cotton, as executrix aforesaid, against all and each of said adversary claimants as well as against the United States; and she prays that this bill may be considered as her answer to the bills of interpleader filed against her by said claimants, or any of them, or which may be filed against her, and that she may be awarded the proceeds of said cotton, and have such other and further relief as may be right and proper. May

20 it please your honorable court to award and grant unto your oratrix such process against said claimants, upon this bill, as may be in accordance with the course of this honorable court; and as in duty, &c.

R. J. BRENT,
Solicitor for Claimant.

DISTRICT OF COLUMBIA,
County of Washington, to wit:

JULIA A. NUTT, the above petitioner, on oath, deposes and says that, to the best of her knowledge, belief, and information, no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as follows, to wit.

First, an assignment made by said Haller Nutt, on the first day of April, 1864, to Blossom, Riggen & Co., the consideration of which she is informed and believes has failed, and by reason thereof the said assignment hath been and is nugatory, rescinded, and of no force.

Secondly. An interest by way of contingent compensation for personal services rendered and to be rendered by the agents of said Haller Nutt and of this deponent in and about said cotton, and the prosecution of the claim of your petitioner; that your petitioner, as she verily believes, is justly entitled, as such executrix, to the amount claimed in said petition from the United States, after allowing all just credits and offsets. That she believes the facts stated in said petition are true.

R. J. BRENT, *Solicitor.*
JULIA A. NUTT, *Ex'r'x.*

Subscribed and sworn to before me this 11 day of February, 1869.
JOHN RANDOLPH,
Ass't Clk C't of C.

Post-office of claimant, Natchez, Mississippi.
" of solicitor, Baltimore, M'd.

21 *Amendment to petition.*

In the United States Court of Claims.

MARY ANN WELLS AND OTHERS
vs.
THE UNITED STATES. } No. 3152.

And now comes Bessie E. Gaussen, one of the petitioners in this cause, and, by leave of the court, amends the petition, and says that she is also dative testimentary executrix of the last will and testament of John K. Elger, deceased, named in the petition, and that the other petitioners are next of kin and distributees of the estate of said deceased.

D. D. WITHERS,
Attorney for Bessie E. Gaussen.

STATE OF NEW YORK,
County of New York:

Before the undersigned, on this 8th day of December, 1871, personally appeared D. D. Withers, and signed the foregoing amendment, and

made oath, according to law, that he believes the facts stated therein, and in the petition in this cause, to be true, and that no assignment or transfer of the said claim or of any part thereof, or any interest therein, has been made, and that the claimant is entitled to recover the amount therein claimed from the United States, after allowing all just credits and offsets.

D. D. WITHERS.

Sworn to before me this 8th day of December, 1871.

HORACE W. FOWLER,
Commissioner Court of Claims.

22 In the United States Court of Claims. December term, A. D. 1868.

CORNELIUS V. WOODRUFF AND A. BOUCHARD
vs.
THE UNITED STATES. } No. 2157.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimants in the sum of $, the said defendants say that they are not indebted to the said claimants in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said claimants, at all times, borne true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney-General.

And, for a further plea to the said petition, the said defendants say that the said claimant' ought not to have or maintain their aforesaid action against the said defendants, because they say that the said claimant' did not, "within two years after the suppression of the late rebellion, prefer their claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress, approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney-General.

And, for a further plea to the said petition, the said defendants say that the said claimants ought not to have or maintain their aforesaid action against the said defendants, because they say that the said claimant', at the time of the filing of their said petition, were aliens, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth, were made and done in the administration of, and in virtue and under color of, the act of Congress entitled "An act to provide for the collection of aban-

doned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress, entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimants are barred of their said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

23 In the United States Court of Claims. December term, A. D. 1868.

JULIA A. NUTT, EXE'R'X OF HALLER NUTT,
vs.
THE UNITED STATES. } No. 3496.

And the said defendants, by their Attorney-General, come and make answer to the petition of the claimant herein; and, not confessing the same, or any part thereof, deny each and every the allegations therein contained, and call for strict proof of the same.

And as to so much of the said petition as sets forth and avers that the said United States are indebted to the said claimant, as executrix of the said Haller Nutt, in the sum of $, the said defendants say that they are not indebted to the said claimant, as such executrix, in the said sum of money, nor any part thereof.

And as to so much of the said petition as avers that the said Haller Nutt at all times bore true faith and allegiance to the Government of the United States, and never voluntarily aided, abetted, or given encouragement to rebellion against the said Government, the said defendants deny the said allegation.

T. LYLE DICKEY,
Assistant Attorney-General.

And, for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain her aforesaid action against the said defendants, because they say that the said claimant did not, "within two years after the suppression of the late rebellion, prefer her claim to the proceeds" of the property mentioned and described, in the Court of Claims, as provided by the 3d section of the act of Congress, approved March 12, 1863, and entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

T. LYLE DICKEY,
Assistant Attorney-General.

And, for a further plea to the said petition, the said defendants say that the said claimant ought not to have or maintain her aforesaid action against the said defendants, because they say that the said claimant, at the time of the filing of her said petition, and the said Haller Nutt in his life-time, were aliens, and that the said seizure and taking possession of the said property named in the said petition, and the said several acts and doings of the defendants, their officers, servants, and agents therein set forth, were made and done in the adminis-

tration of, and in virtue and under color of, the act of Congress, entitled "An act to provide for the collection of abandoned property and for the prevention of frauds in insurrectionary districts within the United States."

Whereby and by virtue of the provisions of the act of Congress entitled "An act regulating judicial proceedings in certain cases, for the protection of officers and agents of the Government, and for the better defence of the Treasury against unlawful claims," approved July 27, 1868, the claimant is barred of her said action against the defendants.

T. LYLE DICKEY,
Assistant Attorney-General.

24 In the Court of Claims. December term, 1868. January 7, A. D. 1869.

2157. C. V. WOODRUFF ET AL. *vs.* THE UNITED STATES.

3203. CHARLES S. LOBDELL *vs.* THE UNITED STATES.

3223. ARCHIBALD MONTGOMERY *vs.* THE UNITED STATES.

3496. JULIA A. NUTT, EXE'X, *vs.* THE UNITED STATES.

3119. JAMES SYME *vs.* THE UNITED STATES.

3152. MARY A. WELLS ET AL. *vs.* THE UNITED STATES.

The motion filed by Mr. Hale, special counsel for the defendants, was allowed, and ordered the respective counsel for the claimants to file interpleaders therein within thirty days from this date, upon presentation of petitions in due form, and upon showing interest in the subject-matter of the claims, and the right of the party filing such petition to be heard in this court.

By the court.

25 In the Court of Claims. December term, 1868.

2157. C. V. WOODRUFF ET AL. *vs.* THE UNITED STATES.

3203. CHARLES S. LOBDELL *vs.* THE UNITED STATES.

3223. ARCHIBALD MONTGOMERY *vs.* THE UNITED STATES.

3496. JULIA A. NUTT, ADM'RS, *vs.* THE UNITED STATES.

3152. MARY ANN WELLS ET AL. *vs.* THE UNITED STATES.

And now, January 21, 1869, it is ordered that the above-named parties file their several interpleaders within thirty days from this day.

By the court.

In the Court of Claims. December term, 1868.

CORNELIUS V. WOODRUFF ET AL. *vs.* THE UNITED STATES. } 2157.

And now, February 11, A. D. 1869, in this case Mr. Weed filed a motion in behalf of Archibald Montgomery for liberty to interplead. Motion submitted.

26 In the Court of Claims. December term, 1868.

CORNELIUS V. WOODRUFF ET AL. } 2157.
vs.
THE UNITED STATES. }

And now, February 17, 1869, the motion filed by Mr. Weed on the 11th February, 1869, for liberty to Archibald Montgomery to interplead in this case, was allowed.

By the court.

In the Court of Claims. December term, 1868.

FEBRUARY 25, 1869.

C. V. WOODRUFF ET AL. } 2157.
vs.
THE UNITED STATES. }

Mr. Corwine filed a motion setting forth the causes for which he moved that the cases of Julia A. Nutt, ex'r'x, vs. The United States, 3496, and Mary A. Wells et al. vs. The United States, 3152, interpleading in the case of C. V. Woodruff et al., should be stricken from the docket.

27 In the Court of Claims. Dec. term, 1868.

MARCH 1, 1869.

Mary Ann Wells et al., vs. The United States, 3152, interpleading in the case of C. V. Woodruff et al., the motion to erase the petition of interpleader was refused.

By the court.

In the Court of Claims. Dec. term, 1869.

2157. C. V. WOODRUFF ET AL. *vs.* THE UNITED STATES.

3223. ARCHIBALD MONTGOMERY *vs.* THE UNITED STATES.

3496. JULIA A. NUTT, EX'R'X, *vs.* THE UNITED STATES.

3152. MARY A. WELLS ET AL. *vs.* THE UNITED STATES.

And now, March 23, 1870, ordered that each of the claimants, in the above consolidated cases, show cause before this court, on the first Tuesday of April next, why the consolidated cases should not, then and there, be tried or their respective petitions be dismissed; and on failure to show cause, the said consolidated case of C. V. Woodruff et al. vs. The United States will be proceeded with, and the petitions of claimants, not then appearing, will be dismissed.

By the court.

28 In the Court of Claims. Dec. term, 1869.

2157. CORNELIUS V. WOODRUFF ET AL. *vs.* THE UNITED STATES.

3223. ARCHIBALD MONTGOMERY *vs.* THE UNITED STATES.

3496. JULIA A. NUTT, EX'R'X, *vs.* THE UNITED STATES.

3152. MARY A. WELLS ET AL. *vs.* THE UNITED STATES.

And now, to wit, on this fifth day of April, 1870, at which day it was

heretofore ordered, by this court, that the claimants in the above-entitled causes respectively should show cause why the said causes, as consolidated, should not be now here tried or the respective petitions of said claimants be dismissed; said order further providing that, on failure to show cause, the said consolidated case of C. V. Woodruff & other' vs. The United States should be proceeded with, and the petitions of claimants, not then appearing, should be dismissed; and the said claimants, C. V. Woodruff and Adolph Bouchard, now appearing by T. H. N. McPherson, esq., of counsel, and the said claimant, Archibald Montgomery, appearing by Messrs. Weed and Clarke, his attorneys, and Robert S. Hale, esq., special counsel, appearing for the defendants, and none of the other claimants above named; and it being now here suggested to the court that the evidence of the claim-
29 ant, Julia A. Nutt, ex'r'x, &c., has been completed and her said cause entered upon the watch-book, and that no evidence has been taken in the said cause of Archibald Montgomery or in the said cause of Mary Ann Wells et al.; and, no sufficient cause to the contrary thereof being shown, and it appearing that all said parties having had due notice of said order to show cause, it is therefore ordered, the petitions of the claimants be, and they are hereby, dismissed in the said causes of Archibald Montgomery vs. The United States, No. 3223, and of Mary Ann Wells et al. vs. The United States, 3152.

And it is further ordered that the said consolidated causes of C. V. Woodruff & other' vs. The United States, 2157, and Julia A. Nutt, ex'r'x, vs. The United States, 3496, be set for trial on the 18th day of April inst., subject to the right of any party to move for further postponement or continuance on good cause to be shown.

By the court.

30 In the Court of Claims. Dec. term, 1870.

DECEMBER 19, 1870.

MARY ANN WELLS ET AL. *vs.* THE UNITED STATES. } 3152.

Messrs. Carlisle and McPherson filed a motion to vacate the order of the court made in this case on the 5th day of April, 1870.

In the Court of Claims. Dec. term, 1870.

MARY ANN WELLS ET EL. *vs.* THE UNITED STATES. } 3152.

And now, February 6, A. D. 1871, the order of the court dismissing the petition, on the default of the claimants to prosecute, is set aside, and the case restored to the docket.

By the court.

31 In the Court of Claims. Dec. term, 1870.

2157. WOODRUFF AND BOUCHARD *vs.* THE UNITED STATES.

3496. JULIA A. NUTT, EX'R'X, *vs.* THE UNITED STATES.

And now, May 16, A. D. 1871, ordered that these cases be continued

to the next term; and, with the case of Mary A. Wells et al. vs. The United States, 3152, to be heard on Tuesday, the 12th of December next.

By the court.

31½ In the Court of Claims.

2157. WOODRUFF & BOUCHARD *vs.* THE UNITED STATES.

3496. JULIA A. NUTT, EX'R'X, *vs.* THE UNITED STATES.

3152. MARY A. WELLS ET AL. *vs.* THE UNITED STATES.

And now, January 16, 1872, Mr. Corwine commenced an argument of these cases, as counsel for Woodruff & Bouchard, when it was ordered by the court that the hearing of these cases will be postponed till the 5th day of March next, with leave to either party then to introduce evidence in open court in regard to the execution of the supposed contract of sale, purporting to have been executed on the 31st of July, 1863, between Gordon, as agent of Elgee, and Chambers and Lobdell.

A true copy.

32 In the United States Court of Claims. Dec. term, 1871.

CORNELIUS V. WOODRUFF AND ADOLPH Bouchard, copartners, under the firm of C. V. Woodruff & Company,
vs.
THE UNITED STATES. } 2157.

THE SAME, FOR THE USE OF C. S. LOBDELL,
vs.
THE UNITED STATES.

BESSIE ELGEE GAUSSEN, EXECUTRIX OF J. K. Elgee, and Mary Ann Wells et al., children of J. K. Elgee,
vs.
THE UNITED STATES. } 3152.

JULIA A. NUTT, EXECUTRIX OF HALLER Nutt,
vs.
THE UNITED STATES. } 3496.

These cases coming on to be heard upon the original petitions and pleas between the respective parties, claimants, and the defendants; and also upon the intervening petitions and pleadings between the respective claimants concerning their adverse interests in the fund which forms the subject of the litigation; and also, upon the evidence of the respective claimants, both as it regards the defendants and between each other. And it appearing by a deposition of Josiah Cham-
33 bers, taken and filed in the case, and admitted ex parte on the behalf of the representatives of said Elgee, that he, the said Chambers, before the seizure of said 572 bales of cotton, had withdrawn from his copartnership or joint interest with said Elgee, and at the time of said seizure had no interest in said cotton, and disclaims any

interest therein, or in the proceeds thereof, or in the said suits, or any of them, and that, previous to said seizure, any former interest of said Chambers in said cotton had accrued to and vested in said Elgee, and that he was deceased, and that said Bessie Elgee Gaussen is his lawful executrix and representative of his estate; and it appearing from the evidence that the said Bessie E. Gaussen, as executrix aforesaid, is interested in the fund to the amount of seventy-six thousand four hundred dollars, with proportionate interest thereon, and that the said Charles S. Lobdell, purchaser of said cotton before its seizure, is interested in the fund to the amount of fifty-four thousand three hundred and sixty-three dollars and sixty cents, with interest thereon; and the claimants, Woodruff and Bouchard, copartners under the style
34 of C. V. Woodruff and Company, are interested in their own right in all the remaining portion of the fund, and interest thereon accrued; and it appearing that the said Charles S. Lobdell has consented to this suit being prosecuted by the said Woodruff and Bouchard to secure his interest in the fund; and that it is to that extent prosecuted by them, for his use and benefit.

Now, it is adjudged and decreed in these cases:

1st. That the claimant, Bessie Elgee Gaussen, executrix of J. K. Elgee, recover of the fund of $366,170.83, now in the Treasury of the United States, being the net proceeds of 572 bales of cotton captured as aforesaid, the proportionate sum of $103,581.80, together with the interest thereon accrued as aforesaid and in the Treasury, amounting to $34,300.82, and making in the aggregate the sum of $137,882.62.

And that the said claimants, Woodruff and Bouchard, recover of said fund, to the use and benefit of the said Lobdell, the sum of $54,363.60, as his proportionate part of said proceeds of said cotton, with the interest thereon as aforesaid, being $18,002.35, making in the aggregate $72,365.95.

And that the said Woodruff & Bouchard recover to their own use of the said fund, as their proportion of said proceeds of said cotton,
35 $117,183.75, together with the interest thereon accrued as aforesaid, amounting to $38,738.51, amounting in the aggregate to $155,922.26.

And it is further adjudged and decreed as to the claimant, Julia A. Nutt, executrix of Haller Nutt, that her petition be dismissed.

And that, as to the claimants, Mary Ann Wells and others, children and representatives of said J. K. Elgee, that their joint petition be dismissed, except so far as the same is the petition of Bessie Elgee Gaussen, executrix of said J. K. Elgee.

A true copy.
By the court.
MAY 8, 1872.

36 In the Court of Claims. December term, 1871.

WOODRUFF & BOUCHARD
vs.
THE UNITED STATES. } 2157.

JULIA A. NUTT, EXECUTRIX OF HALLER NUTT, deceased,
vs.
THE UNITED STATES. } 3496.

MARY A. WELLS & OTHERS
vs.
THE UNITED STATES. } 3152.

Now comes the defendants, by their Attorney-General, and ask the court for the allowance of an appeal in the above cases (in which the parties claimants have interpleaded) from the judgment of the Court of Claims herein, on the 8th day of May, 1872, to the Supreme Court of the United States.

WILLIAM MCMICHAEL,
Assistant Attorney-General.

Filed in clerk's office, Washington, D. C., June 14, 1872.

AT CHAMBERS.

Ordered that the appeal be allowed as prayed for.
C. D. DRAKE, *C. J.*

37 In the Court of Claims.

C. V. WOODRUFF & COMPANY
vs.
THE UNITED STATES. } 2157.

Said C. V. Woodruff and Company pray the court to grant them an appeal in this case to the Supreme Court.

R. M. CORWINE,
Att'y for Claimants C. V. Woodruff & Co.

Filed June 7, 1872.

AT CHAMBERS.

Ordered that the appeal as prayed be allowed.
C. D. DRAKE, *C. J.*

38 In the Court of Claims. No. 3152.

MARY ANN WELLS, CLARA M. SMITH, LOUISIANA I. ISAACS, CATHERINE M. JONES, MARY E. FAUNTLEROY, and BESSIE E. GAUSEN, in her own right, and as tutrix of THOMAS SCOTT, MATILDA SCOTT, MARY A. SCOTT, and ELGEE SCOTT, infants, and as executrix of JOHN K. ELGEE,
vs.
THE UNITED STATES.

The claimant, Bessie Elgee, executrix of John K. Elgee, deceased, prays an appeal to the Supreme Court of the United States from the judgment of the Court of Claims in this cause.

J. M. CARLISLE,
J. D. MCPHERSON,
Att'ys for Claimant.

Filed in the clerk's office August 6, 1872.

AT CHAMBERS.

Ordered that the appeal as prayed be allowed.
C. D. DRAKE, *C. J.*

39 In the United States Court of Claims.

JULIA A. NUTT, EXECUTRIX OF HALLER Nutt, dec'd,
vs.
THE UNITED STATES.
} No. 3496, and interpleading with—

WOODRUFF AND BOUCHARD
vs.
THE UNITED STATES.
} No. 2157.

The claimant, Julia A. Nutt, executrix of Haller Nutt, deceased, appears in her own proper person, and appeals to the Supreme Court of the United States from the judgment and decree of the Court of Claims in the above-stated case, and which appeal she prays may be allowed by the said Court of Claims.

And she will pray, &c.

JULIA A. NUTT,
Ex'r'x of Haller Nutt, dec'd.

Filed in clerk's office August 6th, 1872.

AT CHAMBERS.

Ordered that the appeal as prayed be allowed.

C. D. DRAKE, *C. J.*

40 United States Court of Claims.

CORNELIUS V. WOODRUFF AND ADOLPH BOUchard, copartners under the style and firm of C. V. Woodruff & Company,
vs.
THE UNITED STATES.

SAME, FOR THE USE OF CHARLES S. LOBDELL
vs.
THE UNITED STATES.

JULIA NUTT, EXECUTRIX OF HALLER NUTT,
vs.
THE UNITED STATES.

BESSIE ELGEE GAUSEN, EXECUTRIX OF JOHN K. Elgee, and Mary Ann Wells et al., children and heirs at law of J. K. Elgee,
vs.
THE UNITED STATES.

By order of this court, these cases were heard together, and in reference to them the court finds the facts to be:

That, on the 31st of July, 1863, William C. Gordon, as agent of J. K. Elgee, and Josiah Chambers and Charles S. Lobdell, made the contract, of which copy is hereto annexed and marked A, and Lobdell then paid to Gordon the $30 specified in the contract.

That, at the time of making the contract, Gordon was the agent of Elgee & Chambers to carry on the three plantations worked by them,

and situated in Wilkinson County, in the State of Mississippi, and known as the Artonish, Loch Leven, and the Lochdale plantations, on which the cotton was raised. And Gordon was authorized by Elgee & Chambers to make in their behalf the contract above specified.

At the time of making the contract, the cotton baled was stored under a covering of boards, and a small part of the cotton, about twenty bales not baled, was in the gin-house on the Buffalo Bayou, about ten miles from the Mississippi River, at a place known as "The Rocks," or "Felter's plantation," then without the Federal military lines. And Gordon and Lobdell were together there.

At the time of making the contract Lobdell was a citizen and resident of West Baton Rouge, in the State of Louisiana; and Elgee & Chambers were citizens and residents in Alexandria in that State; and West Baton Rouge and Alexandria were then disloyal territory.

Immediately after the sale, Lobdell employed J. M. Morris, living near where the cotton was stored, to watch and take care of the cotton, and paid him therefor, and Morris continued his care of the cotton till it was taken possession of in the name of the United States, as hereinafter stated.

In the year 1863, James H. McEvey applied to Elgee to purchase the cotton stored at Buffalo Creek, [and Elgee told him that he had already sold the cotton to Mr. Lobdell, through his overseer, Mr. Gordon.]

41 (The counsel for the United States objected to the statement of Morris included in brackets, that it was hearsay.)

In the month of October, 1863, Haller Nutt, a citizen of Mississippi, employed as his agent Truman Holmes, to go from Natchez, then in possession of the military forces of the Union, into the territory of the confederacy to purchase cotton.

At this time Dr. Nutt resided in the immediate vicinity of Natchez, and within the military lines and control of the Union forces; and he procured from the military authorities there permits for Holmes to pass out of and into said lines, on said agency.

In October, 1863, Holmes, as the agent of Dr. Nutt, contracted with Mr. Elgee for the sale from him of so much of the 2,100 bales of cotton stored at Felter's plantation as he (Holmes) should get out in safety to a market, for the price of £15 per bale, to be paid at Liverpool. The risk of the cotton till got out to be on Mr. Elgee.

At the time of making the contract between Elgee and Holmes, Chambers was present, and assented to the contract, and said he had given up the control and disposition of the cotton to Elgee.

On the 8th day of October, 1863, Elgee made and delivered to Holmes the writing hereto annexed and marked Z.

After the making of the contract between Elgee and Holmes for the sale of the cotton, Elgee wrote to Gordon, and, after stating that Holmes had been at Alexandria, and negotiated for the cotton, provided he complied with the agreement between them, and that two months had elapsed, and he had not heard from Holmes, he (Elgee) desired Gordon to say to Holmes that the agreement between Elgee and Holmes was at an end.

In the spring of 1864 Holmes exhibited to Mr. Gordon the writing, a copy of which is above refered to as marked Z, and Mr. Gordon then communicated to Holmes the message above stated as received by Gordon and Elgee.

On the 15th day of March, 1864, C. V. Woodruff & Co. and the said C. S. Lobdell, by his duly-authorized agent, V. Hebert, made the contract, a copy of which is hereto annexed and marked B.

At the time of making this contract, Lobdell, and Woodruff, and Bonchard were citizens of and residents in the city of New Orleans, then loyal territory.

At the time of making the contract, the cotton which was the subject thereof was, as theretofore, on the Felter's plantation, and the said Morris had the custody thereof as theretofore, and was informed of its sale by Lobdell to C. V. Woodruff & Co., and thereafter continued such custody as he exercised before.

On the 2d day of April, 1864, B. F. Camp, claiming to be an agent of the Treasury Department, and to act in behalf of the United States, took possession of 572 bales of said cotton. Mr. Morris objected to the taking of said bales, that the cotton had been purchased by Woodruff & Co.; and Mr. Gordon, as agent of Elgee, claimed to have possession of the cotton, and said it had been purchased by a firm in New Orleans. Mr. Camp placed 500 bales of the cotton on board the Venango, and 72 bales on board the United States gunboat Champion, which accompanied him on his expedition; and afterward the 572 bales were carried to Natchez, in the steamer Venango, by Mr. Camp, and by him delivered to the agent of the United States as abandoned cotton, on the 9th of April, 1864; it then being in the Government yard under an order from General Tuttle.

Mr. Gordon accompanied the cotton to Natchez, in the Ve-
42 nango, and called on General Tuttle, and informed him that the cotton was neither confederate cotton nor abandoned cotton, but that it belonged to J. K. Elgee; but Mr. Gordon could obtain no information from General Tuttle as to what disposition he should make of the cotton. On the next day, Gordon, meeting Dr. Nutt, informed him of the trouble he (Gordon) was in as to the cotton, when Dr. Nutt stated to Gordon that if he would ratify the sale of the cotton entered into between Elgee and Holmes, he (Dr. Nutt) thought he would have sufficient influence with General Tuttle to procure the release of the cotton, and have it stored in the Government yard at Natchez; and thereupon, and on those grounds, Gordon indorsed on said letter of October 8 the ratification marked Y.

On the 2d day of May, 1864, the said 572 bales of cotton were shipped to Saint Louis, Missouri, to the Treasury agent there, on board the steamer Olive Branch.

On the 2d day of May the said J. K. Elgee took, subscribed, and caused to be permanently recorded, the oath, a copy of which, and of the certificate thereto, is hereto annexed and marked O, and thereafter the said Elgee faithfully kept said oath.

On the 3d day of May, 1864, the assignment marked 1, and indorsed on the contract hereto annexed and marked A, and the assignment marked 2, and indorsed on the contract hereto annexed and marked B, were made by said Lobdell to said Woodruff & Co.

On the 9th day of May, 1864, the said 572 bales of cotton were received at Saint Louis, and were libelled for freight and charges.

On the 11th day of June, 1864, a suit of replevin was brought by John K. Elgee against Oliver S. Lovell, as agent of the United States, then in possession of said cotton, in the circuit court for Saint Louis County, Missouri, which was subsequently transferred to the circuit court of the United States for the district of Missouri; and, pending said suit, the stipulation, a copy of which is hereto annexed and marked J, was made by and between the parties thereto.

On July 4, 1864, the said 572 bales of cotton were sold at public auc-

tion, and its proceeds were applied and invested under and according to said stipulation.

And thereafter, judgment having been rendered against said Elgee in said above-mentioned suit in the circuit court of the United States for the district of Missouri, and said judgment having been affirmed in the Supreme Court of the United States, the net proceeds of said cotton, and the interest accrued on the bonds wherein the said proceeds were invested, amounting together to $366,170.83, were paid into the Treasury.

The said Charles S. Lobdell, Cornelius V. Woodruff, and Adolph Bonchard have always borne true allegiance to the United States, and have never voluntarily aided, abetted, or given encouragement to rebellion against the Government thereof.

At the time of making the contract between Elgee and Chambers and Lobdell, on July 3, 1863, and until the seizure of the 572 bales by the United States, above stated, the removal of said 2,100 bales of cotton from where it was stored on Buffaloo Bayou, without a strong force to protect it, would have subjected it to the peril of being destroyed by the confederates or raiders. And shortly after the removal of the 572 bales by the United States, the residue of the 2,100 bales was burned by raiders.

C. V. Woodruff & Co. were authorized by Charles Lobdell to prosecute this suit for his benefit; and C. V. Woodruff & Co. agreed in
43 open court, by their counsel, that the court should apportion the fund in suit among the parties found to be equitably interested therein.

The gross proceeds of the sales of said 572 bales of cotton were		$381,428 27
From these were deducted:		
For freight, charges, and expenses of, and prior to said sales	$45,349 12	
Legal expenses	16,000 00	
Amount paid B. F. Camp, on account of contract by the United States with him for collecting said 572 bales for an interest therein	30,000 00	
Amount paid William Prescott Smith, on account of his interest in said contract with B. F. Camp	15,000 00	
		106,349 12
And for the last two items the United States held the bonds hereto annexed, and marked bond 1, bond 2, respectively:		
Net proceeds		275,079 15
Interest on bonds		91,091 68
To be divided		366,170 83

CONCLUSIONS OF LAW.

1. That the United States hold the net proceeds of said 572 bales of cotton as trustees for those beneficially interested therein according to their respective interests therein.

That, by and from the date of the contract made July 31, 1863, by Elgee and Chambers, through their agent, Gordon, with Charles S. Lob-

dell, the right of property in the 2,100 bales of cotton therein specified was vested in said Lobdell; and a right to the price at 10 cents per pound, with a lien therefor on said cotton, was vested in said Elgee and Chambers. The weight of so much of the cotton as was lost to the parties, or destroyed before weighing, to be taken at 500 pounds per bale.

That the contract made March 15, 1864, between Lobdell and C. V. Woodruff & Co. was executory only, so that the property in the cotton therein specified remained in Lobdell after said contract.

That the parties to and those interested in said contract, made 15th March, 1863, between said Lobdell and C. V. Woodruff & Co., are entitled to the specific performance of said contract.

That, from the net proceeds of said 572 bales of cotton, and the interest accrued thereon, the said Elgee & Chambers are entitled to be paid at the rate of 10 cents per pound on 1,528 bales thereof, of 500 pounds each; and on 572 bales at the actual weight thereof, and their proportion of said interest.

And the said Lobdell is entitled to be paid at the rate of 20 cents per pound on 572 bales of said cotton, at their actual weight, and his proportion of said interest.

And the said C. V. Woodruff & Co. are entitled to be paid the balance of said net proceeds and interest.

That the contract made in October, 1863, between J. K. Elgee and Haller Nutt, through his agent, Truman Holmes, was executory merely, and that thereby the said Nutt acquired no property in said 2,100 bales of cotton, and no right to the net proceeds of 572 bales thereof in the Treasury or to the interest thereon.

That the said contract between said Elgee and said Nutt was made in violation of the non-intercourse acts, and is void.

By the court.

44 *Findings.*

In the Court of Claims.

C. V. WOODRUFF & Co.
vs.
THE UNITED STATES. } No. 2157.

I. The claimants' loyalty throughout the war, and that they gave no aid and comfort to the enemy, are established.

II. That, on the 31st of July, 1863, Elgee and Chambers, through their duly-authorized agent, W. C. Gordon, executed to C. S. Lobdell the following bill of sale of 2,100 bales of cotton, of which the 582 bales in controversy formed a part:

MISSISSIPPI, *Wilkinson County:*

We have, this thirty-first day of July, eighteen hundred and sixty-three, sold unto C. S. Lobdell our crop of cotton, now lying in this county aforesaid, numbering about two thousand one hundred bales, at the price of ten cents per pound, currency; the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed, Mr. Lobdell agreeing to furnish, at his cost, the bagging, rope, and twine necessary to bale the ginned and unginned cotton, and we acknowledge to have received, in order to confirm this contract, the sum of thirty dollars.

This cotton will be received and shipped by the house of Dalitra & Co., New Orleans, and from this date is at the risk of Lobdell. This cotton is said to have weighed an average of five hundred pounds when baled.

(Signed) W. C. GORDON,
Agent for Elgee & Chambers.

45 C. S. LOBDELL.

[Stamp.]

I hereby transfer all my right, title and interest to the within contract to Mess. Woodruff, of the city of New Orleans.

(Signed) C. S. LOBDELL.

3RD MAY, 1864.

[Stamp.]

We also find that, on the 3rd May, 1864, said Lobdell appended to another copy of the same instrument these words: "For the purpose of instituting suit, I have transferred the contract for the Elgee & Chambers' cotton referred to above. The contract above is still in full force and effect."

(Signed) C. S. LOBDELL.
Per HABER.
C. V. WOODRUFF & CO.

III. That Gordon informed said Elgee of the sale aforesaid, and received from Elgee in answer thereto the original, of which the annexed is a copy, marked B, and made part thereof, and that actual possession was given to said Lobdell of said cotton, and through his agents, Ventress and Morris, retained possession thereof, who exercised personal supervision over the same from the day of sale, and held continuously up to the time of the sale by Lobdell to claimants. And claimants then appointed said Ventress and Morris, their agents, to take and hold possession for them, who took the possession and continued to hold it until it was taken by one Camp, in manner as hereinafter stated.

IV. That, at the date of the above sale all the parties thereto, to wit, Elgee, Chambers, Lobdell, and Gordon, resided within rebel lines.

46 V. That, on the 15th day of March, 1864, Lobdell, then being in the city of New Orleans, and residing within the limits of the Federal authorities of the United States, for a valuable consideration, transferred to claimants, C. V. Woodruff & Co., a commercial firm, then engaged in business in the city of New Orleans, Louisiana, where the members also resided at the time, all his interest in said sale of said Elgee to himself to claimants, in the city of New Orleans, by an instrument in writing, dated March 15th, 1864, a copy whereof is hereto appended and made part thereof, marked W, who took possession of said cotton through their agents, said Ventress and Morris, who, as such, held it continuously from said sale up to the time when it was taken possession of by one Camp, and removed to Natchez, the same being found in possession of said Morris, as such agent, when it was so taken by said Camp, and that when so sold to said C. V. Woodruff & Co., said cotton was within the military lines of occupation of the Union Army.

VI. That, on or about the 2nd or 3rd of April, 1864, one Camp, under pretext of being thereto specially authorized by the Treasury

47 Department, took possession of said cotton as abandoned property under the act of March 12th, 1863, and removed it to Natchez, against the protest of said agents of claimants, they then and there

protesting in the names of claimants that said cotton was not abandoned, nor was it captured, seized, or taken from hostile possession by the military or naval forces of the United States.

VII. There is no evidence of any authority to Camp to make the seizure either by the military, naval, or civil authorities of the United States, but his pretended authority was disavowed by the special assistant Treasury agent for that district, under whose order he professed to act.

VIII. That an agreement was entered into between the Solicitor of the Treasury, with the sanction of the Secretary of the Treasury, and the attorney and counsel of John K. Elgee, parties to a suit then pending in St. Louis between said Elgee and an agent of the Treasury Department, in relation to said cotton, in virtue of which said cotton was sold and the proceeds thereof, after deducting all legal charges and
48 expenses, were received by the Treasury Department, and the amount thereof invested in United States bonds, bearing interest, which bonds, with the coupons thereon, were to stand in lieu of the cotton to abide the result of said suit; which said agreement was carried into effect so far that the bonds were purchased and retained by the Secretary of the Treasury up to the 29th of April, 1868, when said bonds were sold by the Secretary; that the interest that had accrued on said bonds up to said date, with premium, amounted to $91,091.68. And the aggregate amount, principal, and interest, and premium, to wit, $431,091.68, being the residue of the proceeds of said bonds, principal, premium, and interest, after all lawful deductions were made, was covered into the Treasury.

IX. That C. S. Lobdell duly took the oath of allegiance to the United States on the 14th day of June, A. D. 1864, in pursuance with the President's proclamation of the 8th of December, A. D. 1863; and also, on the 11th day of April, A. D. 1863; and, again, on the 27th of June, A. D. 1865.

49 X. While claimants (C. V. Woodruff & Co.) were engaged in preparing to comply with their engagement to pay for said cotton and remove it to New Orleans, having already obtained from the United States authorities the necessary permits and authority for that purpose, they were informed that one Camp had seized and carried said cotton to Natchez. Whereupon A. Bouchard, one of the claimants, followed the same to Natchez, and demanded the restoration of said cotton from the Treasury agent at that point as claimants' property, which was refused, and the said agent shipped the same to St. Louis to another Treasury agent. That said Bouchard immediately followed the said cotton to St. Louis, and demanded its restoration to him as the property of claimants, but it was refused. That said cotton was sold by the Treasury Department, and the proceeds, by arrangement of the parties in interest, were invested in United States coupon-bonds, drawing interest. That said Bouchard, still acting for himself and partner, demanded of the Secretary of the Treasury the surrender to him of said bonds; but the Secretary refused to surrender them, whereupon this suit is instituted; but, subsequently, and after this suit was brought, the Secretary of the Treasury sold said bonds, and paid the proceeds into the Treasury which included the principal and also the accrued interest.

XI. That George T. Denison, special agent for the Treasury Department, on the 2nd day of April, 1864, issued to C. V. Woodruff
50 authority for the purchase of products in the State of Mississippi, and for transportation of the same to market, and said Woodruff, in due form, executed the necessary bond in pursuance with law, where-

upon R. S. Hart, assistant special Treasury agent and acting collector of customs at Natchez, Mississippi, did, in due form and according to law, and after full compliance with the requirements of law, on the 5th day of April, A. D. 1864, issue to said Woodruff authority and permission to purchase and transport to New Orleans and sell the 2,100 bales of cotton so by said C. V. Woodruff purchased from said Lobdell.

XII. That Treasury permits to buy and ship to market the products of Wilkinson, and Adams, & other counties in the State of Mississippi, were issued by the proper Treasury agents in due form of law and by warrant of law to divers persons, covering all the time between (& including) February 29th, 1864, and April 27, 1864, and that the cotton in controversy in this case was lying in Wilkinson County when sold to claimants, viz, on the 15th day of March, 1864, and when taken by Camp, viz, April 2nd, 1864.

XIII. That C. V. Woodruff has parted with his interest in this claim, for the proceeds of this cotton, to his partner, Adolph Bouchard, who is now the sole owner of the same, and who alone is authorized to control the judgment herein, and judgment will be entered in his favor.

51 XIV. The court find that in answer to a rule made by this court on the 7th day of January, A. D. 1868, issued to and served on the Secretary of the Treasury, that officer made a return, of which the annexed is a true copy.

XV. That the claim of Julia A. Nutt, executrix, &c., is not valid and is rejected, and her pretensions dismissed.

XVI. That the claims of Mary Ann Wells and others, heirs at law of John K. Elgee, and Bessie E. Gaussen, executrix, &c., are not valid, and are rejected and here pretensions dismissed.

R. M. CORWINE,
C. M. CONRAD,
Atty's for Cl'm'ts.

Filed M'ch 26, 1872.
A true copy.

Upon the foregoing prayer for findings the court made the following order, to wit:

The findings above requested are refused, because, so far as the matters of fact therein stated are not stated in the facts found by the court, they are not authorized by the evidence.

By the court.

52 In the Court of Claims.

MARY A. WELLS AND OTHERS
vs.
THE UNITED STATES. } No. 3152.

Findings asked by the claimants in addition to those found by the court. Filed April 24, 1872.

1. A connection as to the locality of the cotton. The whole being represented by the present findings as on Felter's plantation. Whereas, in fact, the baled cotton was on Felter's plantation and the unbaled on Elgee's.

2. To add that Lobdell and his assigns never furnished any baling or twine, and never offered, really, at Fort Adams, to receive the cotton.

CARLISLE & MCPHERSON,
Att'ys for Cl'm'ts.

A true copy.

Upon the foregoing prayer for findings the court made the following order, to wit:

The findings above requested are refused, because they are not supported by the evidence in the case.

By the court.

53 In the Court of Claims.

CORNELIUS V. WOODRUFF AND ADOLPH BOUCHARD, copartners under the firm of C. V. Woodruff & Company,
vs.
THE UNITED STATES. } 2157.

THE SAME, FOR THE USE OF C. S. LOBDELL,
vs.
THE UNITED STATES.

BESSIE ELGEE GAUSEN, EXECUTRIX OF J. K. Elgee, and Mary Ann Wells et al., children of J. K. Elgee,
vs.
THE UNITED STATES. } 3152.

JULIA A. NUTT, EXECUTRIX OF HALLER NUTT,
vs.
THE UNITED STATES. } 3496.

I, John Randolph, assistant clerk of the Court of Claims, do hereby certify that the foregoing are true transcripts of the pleadings in the above-entitled interpleading causes, and of sundry interlocutory motions and orders of the court thereon, and of the final judgment of the court thereon; of the applications of the Attorney-General and of the
54 solicitors of the several claimants for the allowance of an appeal filed in clerk's office; of the dates therein set forth and respectively allowed by the chief justice of said court at chambers; of the findings of fact and conclusions of law thereon, on which the court founded its judgment; and of the prayer for findings by the claimants C. V. Woodruff & Company, and the order of the court refusing the same; and of the prayer for findings by the claimants Mary Ann Wells and others, and the order of the court refusing the same.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at Washington, this first day of April, A. D. 1873.

[SEAL.] JOHN RANDOLPH,
Ass't Clk C't of Claims.

(Indorsement on cover:) No. 423. The United States, appellants, vs. C. V. Woodruff and A. Bouchard, Julia A. Nutt, ex't'x of Haller Nutt, Mary A. Wells et al. No. 424. Bessie Elgee Gaussen, ex't'x of John K. Elgee, dec'd, appellant, vs. The United States. Court of Claims. Filed 9th April, 1873.

30 *Certiorari & return.—Filed 3d November*, 1873.

THE UNITED STATES OF AMERICA, *ss:*

[SEAL.] The President of the United States of America to the judges of the Court of Claims, greeting:

Whereas in a certain suit in said Court of Claims, between Bessie Elgee Gaussen, executrix, &c., et al., claimants, and The United States, defendants, which suit was removed to the Supreme Court of the United States, by virtue of an appeal, agreeably to the act of Congress in such case made and provided, a diminution of the record and proceedings of said cause has been suggested, to wit:

That, on or about the 30th day of March, in the year 1868, the present appellant, Bessie Elgee Gaussen, being one of the distributees of the estate of John K. Elgee, deceased, together with all the other distributees of said estate, filed an original petition in the Court of Claims, against the United States, claiming the proceeds of the cotton which is the subject of this litigation, which said petition was filed in the said court, within the period prescribed by law, and was and is the
31 commencement of the same suit, which is the subject of the present appeal.

That, thereafter the said Court of Claims so proceeded in the premises as to require the various claimants upon the said fund to interplead before the said court; and the said appellant, in obedience to the said order, filed the petition, which is set forth in the transcript in the appeal now before the court; but the said original petition, which was duly filed within the time prescribed by the statute, does not appear in the said transcript.

You, therefore, are hereby commanded that, searching the records and proceedings in said cause, you certify what omissions you shall find to the said Supreme Court of the United States, so that you have the same, together with this writ, before the said Supreme Court forthwith.

Witness the honorable Nathan Clifford, Senior Associate Justice of said Supreme Court, the twenty-fourth day of October, A. D. 1873.

D. W. MIDDLETON,
Clerk Supreme Court U. S.

(Endorsed:) 3152. Certiorari from Supreme Court U. S. Filed Oct. 24, 1873. J. R.

32 The chief justice and judges of the Court of Claims, in obedience to the within writ, herewith return a true copy of the original petition, filed March 30, A. D. 1868, in the case in which Bessie Elgee Gaussen, the present appellant, is one of the claimants.

Witness my hand and the seal of said Court of Claims, this 3d day of November, A. D. 1873.

[SEAL.] JOHN RANDOLPH,
Ass't Cl'k Court of Claims.

33 [No. 3152.—Filed March 30, 1868.]

To the honorable the Court of Claims of the United States:

The petition of Mary Ann Wells, wife of James Madison Wells; of Clara M. Smith, wife of Dr. Stokes A. Smith, of Louisiana; J. Isaacs, widow of A. J. Isaacs; and of Catharine M. Jones, widow of Robert B. Jones; of Bessie Elgee Gaussen, wife of Edmond J. Gaussen, her hus-

band, in her own right and as natural tutrix and natural guardian of her minor children, Thomas Scott, Mathilda Scott, Mary Ann Scott, and Elgee Scott; and of Mary Eliza Fauntleroy, wife of Fauntleroy, respectfully represents:

That all your petitioners are citizens of the United States, residing in the State of Louisiana, except Mrs. Bessie Gaussen and her minor children, who reside in Ireland, and are citizens of the Kingdom of Great Britain, and except Mrs. Fauntleroy and her husband, who are citizens of the State of Virginia, and of Mrs. Louisiana J. Isaacs, a citizen of Kansas, and that petitioners are the de'cendants and heirs at law, and legal heirs of the heirs at law, of John K. Elgee, and of Mary F. Loulette, wife of John K. Elgee, both deceased, late of the State of Louisiana.

That the said John K. Elgee died, on or about the 14th October, 1864, at New Orleans, Louisiana, leaving a widow and two children, viz: Mrs. Mary F. L. Elgee, Mrs. Bessie Gaussen, an only child by a previous marriage, and Charles Ledoux Elgee, his only child by a second and last marriage; that, after the death of his father, the said John K. Elgee, the said Charles Ledoux Elgee died, leaving a widow, now your petitioner, Mrs. Fauntleroy, and a minor child, named Frances
34 Charles Elgee, as his only heir; that, after the death of the said Charles Ledoux Elgee, the said Frances Charles Elgee, his only child, died, and her mother, then Mary Eliza Elgee, now Mrs. Fauntleroy, became the only heir, and inherited the entire estate and property of her said deceased child; that after the death of Charles L. Elgee, and after the death of his only child, on or about the 1st November, 1867, the said Mrs. Mary F. L. Elgee, widow of John K. Elgee, died, in the State of Louisiana, leaving, as her heirs at law, your petitioners, Mary Ann Wells, Clara M. Smith, Louisiana J. Isaacs, Catherine Jones, her children by her first husband, Thomas C. Scott; and Thomas Scott, Matilda Scott, Mary Ann Scott, and Elgee Scott, minor children of Thomas F. Scott and Bessie Elgee, now Bessie Gaussen; said Thomas F. Scott being the only son of the said Mrs. Mary F. L. Elgee by her first marriage with said Thomas C. Scott, his said son having died before her.

That, at the time of his death, the said John K. Elgee was the sole and only owner of five hundred and seventy-two bales of cotton, which were produced on his plantation, or several plantations, situated on or near the Mississippi River, in Wilkinson and Adams Counties, in the State of Mississippi, and which were of the value of at least four hundred thousand dollars, in the legal currency of the United States; that the said cotton had remained on said plantation, or on a neighboring plantation, from the time of its production until some time about the 2d of April, 1864, when the same was seized by and taken into the possession of the United States Treasury agency as abandoned property, and removed to St. Louis, in the State of Missouri, where the same was sold under order of the United States district for the district of Missouri, and the proceeds, amounting to four hundred thousand dollars, or thereabouts, are now in the Treasury of the United States at Washington, in the District of Columbia.

35 That the said John K. Elgee and his wife, Mrs. Mary F. L. Elgee, always resided in the State of Louisiana, and never on his said plantation in Mississippi; that he always left an overseer or agent in charge of his said property in Mississippi, for the purpose of protecting, preserving, and maintaining possession of the same for him, the said Elgee, which the said overseer or agent did until ousted of posses-

sion, as aforesaid, by the officers of the United States. That the said Elgee never abandoned the said cotton, nor any of his property in the State of Mississippi, and remained up to the time of his death the sole and entire owner of the same.

That said John K. Elgee was always a Union man in heart, and always in reality bore true allegiance to the United States, and never voluntarily aided, abetted, or gave encouragement to the rebellion against the Government thereof, and any act or acts of his that had an appearance contrary thereto were enacted for the purpose of preserving his person and property from injury and destruction by the people of the South, who were rebels against the Government of the United States; and, on or about the day of April, 1864, the said John K. Elgee, that being the first opportunity for him to do so without greatly endangering his life, took the oath of allegiance, &c., prescribed by the proclamation of President Lincoln, dated the 8th day of December, 1863, and thereby entirely renewed his allegiance; and said J. K. Elgee ever after remained within the lines of the Army of the United States, and under the protection of the national flag of the Union, and was thoroughly, entirely, and truly loyal to the Government of the United States.

That, by the laws of Louisiana, where the said Elgee and his wife resided, the property left by said Elgee belonged to his wife and his children, and such also was and is the law of Mississippi, where the said cotton was produced, and where it remained until removed by
36 the officers the United States; and by the death of said John K. Elgee, and the laws of Louisiana and Mississippi, your petitioners became the only owners of said cotton.

That the said cotton, while on or in the neighborhood of said plantation of said J. K. Elgee, was pretended to have been sold by one W. C. Gordon, pretending to represent the said John K. Elgee, but without authority thereto, to one C. S. Lobdell, for which pretended and unauthorized sale no price was paid nor consideration passed, nor did any delivery take place nor follow said pretended sale; that the price pretended to have been agreed on was totally inadequate to the value of said cotton, and the whole was a mere sham or pretence on the part of said Gordon and said Lobdell; that, subsequently, the said Lobdell, equally without consideration, transferred or pretended to transfer to C. V. Woodruff & Co. the said cotton, or the right he had to said cotton, which was also a sham, and without payment of price or delivery, or validity of any kind; that said C. V. Woodruff & Co. are now claiming the proceeds of said cotton in this honorable court, all of which pretended sales, assignments, and transfers were and are illegal and entirely null and void.

That one Miles Sells had himself appointed administrator of the estate of the said John K. Elgee, by a probate court in the State of Missouri, and brought suit in the United States district court for that district for said cotton, against one Oliver Lovell, an agent of the United States Treasury Department, and in which the right to recover in that suit was decided against said estate; and the said Sells pretended to have some right of interest in said cotton, the extent and character of which is unknown to petitioners, and the validity of which is expressly denied.

That petitioners have always borne true allegiance to the
37 United States, and have not voluntarily aided, abetted, or given encouragement to the rebellion against said Government.

Wherefore petitioners pray that they recover of the United States

Government the sum of four hundred thousand dollars, with interest from the 2d day of April, 1864, and for all such other and further aid, remedy, and relief as the nature of the case may require.

MARY ANN WELLS.
CLARA M. SMITH.
CATHARINE M. JONES.
LOUISIANA J. ISAACS.
BESSIE GAUSSEN,
By ROBERT MOTT, *Agent.*
M. E. FAUNTLEROY,
By ROBERT MOTT, *Agent.*

SULLIVAN, BILLINGS & HUGHES and
SEMMES & MOTT,
Solicitors and Attorneys of Claimants.

Personally appeared Mary Ann Wells, Clara M. Smith, Catharine M. Jones, and L. J. Isaacs, claimants in the foregoing petition, who, being sworn, depose and say that the said claimants in said petition are justly entitled to the amount therein claimed of the United States, after allowing all just credits and offsets; that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made, except as in said petition stated; and that they believe the facts as stated in said petition are true.

MARY ANN WELLS.
CLARA M. SMITH.
CATHARINE M. JONES.
LOUISIANA J. ISAACS.

Sworn to and subscribed before me this 25th day of March, 1868.

W. B. HYMAN,
Chief Justice of the Supreme Court of the State of Louisiana.

38 Know all men by these presents, that I, Bessie Gaussen, wife of Edmond J. Gaussen, and only daughter of J. K. Elgee, late of Alexandria, in the parish of Rapides, in the State of Louisiana, have made, constituted, and appointed, and by these presents do make, constitute, and appoint Robert Mott my true and lawful attorney, irrevocable for me and in my name or otherwise, to ask, demand, sue for, prosecute, and take all legal or needful means to collect a claim of dollars in my favor against the Government of the United States, which claim exists by reason of the unjust seizure and taking possession of five hundred and seventy-two bales of cotton, as captured or abandoned property, on the plantations of the deceased, Jno. K. Elgee, the father of the grantor.

And I do hereby authorize my said attorney, upon such terms as he may deem most judicious, to substitute one or more attorneys to act in the premises herein recited, with the same authority as he might have if personally present.

Hereby ratifying and confirming all that my said attorney or his substitute, by him legally appointed, shall lawfully do by virtue hereof in the premises.

In witness whereof I have hereto set my hand and seal at Dungannon, in Ireland, this eleventh day of April, A. D. 1867, (seven.)

[SEAL.] BESSIE GAUSSEN.

I hereby authorize my wife to sign the foregoing power of attorney.
[SEAL.] EDMOND J. GAUSSEN.

Signed, sealed, and delivered by the above-named Bessie Gaussen and Edmond J. Gaussen, this 11th day of April, 1867, before me, at
39 Dungannon, a justice of the peace for the county of Tyrone and senesheal of Dungannon aforesaid.

GEORGE E. BOWEN,
J. P., Senesheal.

To all whom these presents shall come:

I, G. Harris Heap, consul of the United States of America for the port of Belfast, (Ireland,) and its dependencies, do certify and make known that George E. Bowen, whose true signature appears on the annexed document, is a justice of the peace, duly commissioned by the British government for the county of Tyrone, and that full faith and credit are due to his official acts.

Given under my hand and the seal of the consulate, at Belfast, this 12th day of April, in the year one thousand eight hundred and sixty-seven.

[CONSUL'S SEAL.] G. H. HEAP,
United States Consul.

Know all men by these presents that I, Mary Eliza Elgee, of the parish of Rapides, in the State of Louisiana, have made, constituted, and appointed, and by these presents do make, constitute, and appoint, Robert Mott, esq., of the city of New Orleans and State aforesaid, my true and lawful attorney, irrevocable, for me, and in my name or otherwise, to ask, demand, sue for, prosecute, and take all needful means to collect a claim of dollars, in my favor against the Government of the United States, which claim exists by reason of the unjust seizure and taking possession of five hundred and seventy-two bales of cotton, as captured or abandoned property, on the plantations of my deceased father-in-law, John K. Elgee.

And I do hereby authorize my said attorney, upon such terms as he may deem most judicious, and not inconsistent with the conditions of an agreement between me and my said attorney, of even date
40 with this power of attorney, to substitute one or more attorneys to act in the premises herein recited, with the same authority he might have if personally present.

Hereby ratifying and confirming all that my said attorney, or his substitute by him legally appointed, shall lawfully do, by virtue hereof in the premises.

In witness whereof I have hereunto set my hand and seal, at the town of Leesburg, in the State of Virginia, this 1st day of April, 1867.
[SEAL.] MARY ELIZA ELGEE.

Signed, sealed, and delivered in the presence of—
Teste:
By A. R. MOTT.
J. H. MADDOX.

Claimant's address, care of J. Madison Wells, New Orleans, La.
Solicitor's address, Sullivan, Billings & Hughes, and Semmes & Mott, New Orleans, La.

41 United States Court of claims.

CLERK'S OFFICE,
Washington, D. C., 1873

MARY ANN WELLS, WIFE OF JAMES MADISON Wells; Clara M. Smith, wife of Dr. Stokes A. Smith, of Louisiana; J. Isaacs, widow of A. J. Isaacs; and of Catharine M. Jones, widow of Robert B. Jones; of Bessie Elgee Gaussen, wife of Edmond J. Gaussen, her husband, in her own right and as natural tutrix and natural guardian of her minor children, Thomas Scott, Mathilda Scott, Mary Ann Scott, and Elgee Scott; and of Mary Eliza Fauntleroy, wife of Fauntleroy,
vs.
THE UNITED STATES. } No. 3152.

I, John Randolph, assistant clerk Court of Claims, certify that the foregoing is a true copy of the original petition in the case aforesaid filed March 30, A. D. 1868.

In testimony whereof I hereunto set my hand and affix the seal
42 of said Court of Claims this third day of November, A. D. 1873.

[SEAL.] JOHN RANDOLPH,
Ass't Clerk Court of Claims.

43 In the Court of Claims of the United States.

CORNELIUS V. WOODRUFF AND ADOLPH BOUchard, copartners under the firm of C. V. Woodruff & Company,
vs.
THE UNITED STATES. } 2157.

THE SAME, FOR THE USE OF C. S. LOBDELL,
vs.
THE UNITED STATES.

BESSIE ELGEE GAUSEN, EXECUTRIX OF J. K. Elgee, and Mary Ann Wells et al., children of J. K. Elgee,
vs.
THE UNITED STATES. } 3152.

JULIA A. NUTT, EXECUTRIX OF HALLER NUTT,
vs.
THE UNITED STATES. } 3496.

44 I, John Randolph, assistant clerk of the Court of Claims, certify that the following are true copies of the several exhibits annexed to the findings of the court in the aforesaid interpleading causes, to wit: Exhibit A with Exhibit 1 indorsed thereon; Exhibit Z with Exhibit Y indorsed thereon; Exhibit B with Exhibit 2 indorsed thereon, and Exhibits O & J.

In testimony whereof I hereto set my hand and affix the seal of said Court of Claims this first day of November, A. D. 1873.

[SEAL.] (Signed) JOHN RANDOLPH,
Ass't Clk Court of Claims.

45 *Exhibit A, referred to in findings of the court.*

MISSISSIPPI, *Wilkinson County:*

"We have this 31st of July, 1863, sold unto Mr. C. S. Lobdell our crops of cotton, now lying in the county aforesaid, numbering about 2,100 bales, at the price of 10 cents per pound, currency, the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed, Mr. Lobdell agreeing to furnish at his cost the bagging, rope, and twine necessary to bale the cotton unginned; and we do acknowledge to have received in order to confirm this contract the sum of $30. This cotton will be received and shipped by the house of Dasilva & Co., New Orleans, and from this date is at the risk of Mr. Lobdell. This cotton is said to have weighed an average of five hundred pounds when baled.

"W. C. GORDON,
"*Agent for Mr. Elgee & Chambers.*
"C. S. LOBDELL."

46 *Exhibit* 1, *indorsed on Exhibit A.*

"I hereby transfer all of my right, title, and interest, to the within contract to Messrs. Woodruff, of the city of New Orleans.

"C. S. LOBDELL.

"MAY 3, 1864."

[Stamp.]

Exhibit Z, referred to in findings of the court.

"ALEXANDRIA, *October* 8, 1863.

"DEAR SIR: It having been agreed on between you and myself that I sell to you all the cotton of Elgee & Chambers, now baled and under shed, for the price of 15 pounds sterling per bale, payable in Liverpool, you will cause the same to be placed to my credit with James A. Jackson & Co., of Liverpool.

"Yours,

"J. K. ELGEE.

"Captain TRUMAN HOLMES, *Present.*"

47 *Exhibit Y, indorsed on Exhibit Z.*

"Having been notified by Mr. J. K. Elgee of the sale of the within cotton to Mr. T. C. Holmes, I hereby ratify and confirm the same as agent for Elgee and Chambers.

(April 5. W. C. G.)

"W. C. GORDON.

"CAPTAIN HOLMES."

Exhibit B, referred to in the findings of the court.

"NEW ORLEANS, *March* 15, 1854.

"This contract, made this 15th day of March, 1864, between C. S. Lobdell, of the parish of West Baton Rouge, in the State of Louisiana,

and C. V. Woodruff & Co., of the city of New Orleans, witnesses: That Mr. C. S. Lobdell has sold this day to C. V. Woodruff & Co. a certain contract, of which he is the owner and possessor, for the delivery of two thousand one hundred bales of cotton sold to the said Lobdell by Elgee & Chambers, by their agent, C. W. Gordon, of the county of
48 Wilkinson, in the State of Mississippi, as will appear by reference to said contract; and the said C. V. Woodruff & Co., of New Orleans aforesaid, hereby agree to pay to Mr. C. W. Gordon, the agent of Messrs. Elgee & Chambers, at the time of receiving said cotton, the sum of one hundred thousand dollars, or ten cents per pound, currency; and, in case of not being able, from any cause, to pay said Gordon, then said C. V. Woodruff & Co. agree to pay said sum of one hundred thousand dollars, or ten cents per pound, to Mr. Victor Hebert, of No. 47 Common street, New Orleans, for account of said Elgee & Chambers, and also to pay over to said Hebert the further sum of two hundred thousand dollars, or the sum of twenty cents per pound, currency, for account of the said C. S. Lobdell; and, in case the quantity of cotton should fall short, then there shall be paid ten cents per pound for
49 account of said Elgee & Chambers, and twenty cents per pound for account of said C. S. Lobdell, for such amount or quantity of cotton as shall be required from said Elgee & Chambers; and it is understood by both of these contracting parties that this cotton belongs to Mr. Lobdell until the consideration of thirty cents per pound upon the cotton shall be paid, viz: Ten cents per pound to or for account of Elgee & Chambers, and twenty cents to or for account of said Lobdell as aforesaid.

"V. HEBERT,
"*For C. S. Lobdell.*
"C. V. WOODRUFF & CO."

[Stamp.]

Exhibit 2, indorsed on Exhibit B.—J. R.

"I hereby transfer all my right, title, and interest to the within contract to Messrs. Woodruff & Co., of the city of New Orleans.

"C. S. LOBDELL.

"MAY 3, 1864."

50 *Exhibit O, referred to in the findings of the court.*

MARY ANN WELLS AND OTHERS
vs.
THE UNITED STATES. } No. 3152.

Clerk's office, U. S. district court, eastern district of Louisiana.

NEW ORLEANS, *November* 22, 1865.

This is to certify that J. K. Elgee did, on the 2d May, 1864, take and subscribe the oath prescribed by the President's proclamation of December 8th, 1863, and that the same is registered in this office for permanent preservation, bearing the number 123, duplicate.

K. LOEW,
D'y Clerk.

[No. 123, official business.]

United States district court, clerk's office, district of Louisiana.

NEW ORLEANS, *March* 6, 1871.

I do solemnly swear, in presence of Almighty God, that I will
51 henceforth faithfully support, protect, and defend the Constitution of the United States and the Union of the States thereunder, and that I will in like manner abide by and faithfully support all acts of Congress passed during the existing rebellion with reference to slaves, so long and so far as not repealed, modified, or held void by Congress or decision of the Supreme Court; and that I will in like manner abide by and faithfully support all proclamations of the President made during the existing rebellion having reference to slaves so long and so far as not modified or declared void by the Supreme Court.

So help me God.

J. K. ELGEE.

Sworn to and subscribed before me this 2d day of May, 1864.

K. LOEW,
D'y Clerk U. S. Dist. Court, Eastern District of Louisiana.

52 I, Charles Claiborne, clerk of the district court of the United States for the district of Louisiana, do certify that the preceding is a true copy of the original oath of J. K. Elgee, on file in my office. In faith whereof I hereunto set my hand and the seal of our court at New Orleans, this 6th March, 1871.

CHARLES CLAIBORNE,
Clerk.

Exhibit J referred to in findings of the court.

Whereas an action was brought in the circuit court of S't Louis county, and State of Missouri on the eleventh day of June, A. D. 1864, by John K. Elgee against Oliver Lovell, for the recovery of five hundred and seventy-two bales of cotton, which cotton is claimed by the United States as abandoned property, under the act of Congress approved
March 12, 1863, but which the said Elgee claims as his property
53 wrongfully taken and detained from him by the agents of the United States.

And, whereas it is desired that said cotton should be forthwith sold to save risk and expense connected therewith, but without prejudice to any claim set up in respect thereto;

Now, therefore, it is agreed by and between the Solicitor of the Treasury of the United States of the one part, herein acting with the approval of the Secretary of the Treasury, and John K. Elgee of the other part, as follows:

First. The said action shall, without delay, be removed to the circuit court of the United States for the district of Missouri by said Lovell, under the provisions of the act of Congress approved March 3, 1863.

Second. Said cotton shall be sold by the agent of the Treasury Department forthwith, at S't Louis, at auction, to the highest bidder for cash, at which sale the agents and attorneys of said Elgee shall
54 be present and make public announcement that, between said Elgee and United States, the matters of difference in respect to said cotton have been so arranged as that neither said Elgee, nor any

person by him authorized, will assert against any purchaser thereof any claim on his part to said cotton.

Third. From the money received from such sale enough shall be reserved and applied by the agent of the Treasury Department to pay such actual and reasonable expenses connected with the care and sale of said cotton in S't Louis, and such freight on said cotton from Natchez to S't Louis, as may be agreed to by the agents or attorneys of said Elgee, or approved by the Secretary of the Treasury, and also such other expenses, if any, attending the transportation of said cotton to Natchez, and such storage and other expenses charg'able to said cotton at Natchez, as said agent of the Treasury Department shall
55 consider proper and just; provided, however, that said agent shall not pay any such expenses as mentioned in the last preceding clause until after the same shall be approved by the Secretary of the Treasury, which approval shall not be given until after reasonable opportunity shall be given by him to said Elgee or his attorney to be heard in opposition thereto.

Fourth. The remainder of the money received from the said sale shall be invested in the bonds of the United States, known as "ten-forty bonds," with interest-coupons, which bonds shall be immediately made up and sealed in a package, and such package shall be deposited with the assistant treasurer of the United States at S't Louis, as a special deposit subject only to the order of the Solicitor of the Treasury, endorsed with the approval of the Secretary of the Treasury, for the following purposes and upon the following terms, to wit:

56 Said package to remain as such special deposit in the hands of the said assistant treasurer of the United States until the final determination of the said action brought by Elgee against Lovell, it being expressly agreed and understood by the parties hereto, that, upon such final determination of said cause, if it be in favor of said Elgee and against said Lovell, the said package shall be considered as standing in lieu of the five hundred and seventy-two bales of cotton; and if the judgment of the court be for the recovery by said Elgee of the said five hundred and seventy-two bales of cotton, or any part thereof, or for damages in lieu of the same, then the Solicitor of the Treasury shall order the said package, or such proportion of the bonds therein contained as shall be equivalent to the amount or proportion of said five hundred and seventy-two bales of cotton or damages in lieu thereof, for
57 which payment shall have been rendered as aforesaid, to be delivered to the said Elgee or his authorized agents or legal representatives; which order shall in such case be approved as aforesaid by said Secretary, and such delivery be made shall be deemed to be the same as the delivery of said cotton, and shall be in full satisfaction of such judgment and of all damages awarded in said suit, whether equal thereto in amount or not; and also in full satisfaction of all claims of said Elgee against the United States, or any officer or employee thereof, arising out of or in respect to the said five hundred and seventy-two bales of cotton, or against any person who at any time had said cotton in possession under authority of, or under contract with, the United States or any of its officers, agents, or servants:

Provided, that if such delivery shall be prevented by any action
58 or proceeding at law or in equity in respect to said bonds, or said Elgee's interest therein, to which said cotton would, if remaining unsold, have been legally subject, then the delivery by the Solicitor of the Treasury to said Elgee, or his representatives, of such order as above mentioned, approved by the Secretary as aforesaid, shall be

deemed and taken to all intents and purposes as equivalent to the delivery of said bonds, or such portion thereof as shall be embraced therein, and shall have the like effect as the delivery of the bonds themselves, as hereinbefore stipulated.

Fifth. The said Solicitor of the Treasury on his part, agrees that the said Lovell was, at the time of the issue and service of the writ of summons in said cause, in possession of the said five hundred and seventy-two bales of cotton as agent of the United States, and not otherwise; and further agrees that the fact of such possession by him as
59 aforesaid shall be admitted by said Lovell in said case on the record thereof.

In witness whereof the said parties have hereunto set their hands this 22d day of June, 1864.

(Signed) EDWARD JORDAN,
Solicitor of the Treasury.

Approved June 22, 1864.

S. P. CHASE,
Secretary of the Treasury.
JOHN K. ELGEE,
By MILES SELLS,
Attorney in fact.
GLOVER & SHIPLEY,
H. HITCHCOCK,
Attorneys and Counsel for Elgee.

SUPREME COURT OF THE UNITED STATES.

Nos. 142 & 143.

OCTOBER TERM, 1874.

THE UNITED STATES, APPELLANTS,

VS.

C. V. WOODRUFF AND A. BOUCHARD, JULIA A. NUTT, EXECUTRIX OF HALLER NUTT, MARY A. WELLS, ET AL.;

AND

BESSIE ELGEE GAUSSEN, EXECUTRIX OF JOHN K. ELGEE, DECEASED, APPELLANT,

VS.

THE UNITED STATES.

APPEALS FROM THE COURT OF CLAIMS.

On motion of Bessie E. Gaussen, executrix, it is ordered that the record in these causes be remanded to the Court of Claims with instructions to return the same to this court with all convenient speed, having first certified thereon whether upon the hearing of the causes in that court the following facts were found, or assumed to have been found, from the testimony submitted and intended to be included in the
2 finding of facts upon which the judgment was found:

1. That Josiah Chambers, before the seizure of the 572 bales of cotton mentioned in the petition and proceedings, had withdrawn from his co-partnership and joint interest with John K. Elgee in said cotton.

2. That previous to said seizure any former interest of said Chambers in said cotton had accrued to and vested in said Elgee, and he was deceased, and said Bessie Elgee Gaussen was his lawful executrix and representative of his estate.

This order is not intended to authorize the Court of Claims to retry the cause and make new findings, but to enable it to inform this court in an appropriate manner whether the above facts were part of those found, or assumed to have been found, in the cause, and which, under the rules adopted by this court, should have been included in the finding required to be made and filed at or before judgment.

1st March, 1875.

I, D. W. Middleton, clerk of the Supreme Court of the United States, do hereby certify that the foregoing is a true copy of the order of the said Supreme Court entered in the above-entitled causes as the same remains upon the official records of the said Supreme Court.

In testimony whereof I hereunto subscribe my name and affix the seal of said Supreme Court, this first day of March, A. D. 1875.

[SEAL.] D. W. MIDDLETON,
Clerk Supreme Court U. S.

United States Court of Claims.

CLERK'S OFFICE.

I, Archibald Hopkins, chief clerk of the Court of Claims, in compliance with the foregoing order of the Supreme Court, return herewith the record in the above-entitled causes, together with the findings of the Court of Claims, called for by the said order.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Claims this 10th day of March, 1875.

[SEAL.] ARCHIBALD HOPKINS,
Ch. Clerk U. S. Court of Claims.

(Endorsed:) Received March 2, 1875.

Court of Claims.

In response to the instructions of the Supreme Court hereto prefixed and made in the causes of The United States, appellant, vs. C. V. Woodruff, A. Bouchard, Julia A. Nutt, executrix of Haller Nutt, Mary A. Wells, et al., and Bessie Elgee Gaussen, executrix of John K. Elgee, deceased, appellant, vs. The United States, the Court of Claims certifies, that upon the hearing of said causes in said Court of Claims, the following facts were found from the testimony submitted in said causes and intended to be included in the finding of fact upon which the judgment of said Court of Claims was founded:

1. That Josiah Chambers, before the seizure of the 572 bales of cotton mentioned in the petition and the proceedings, had withdrawn from his co-partnership and joint interest with John K. Elgee in said cotton.

2. That previous to said seizure any former interest of said Chambers in said cotton had accrued to and vested in said Elgee, and he was deceased, and said Bessie Elgee Gaussen was his lawful executrix and representative of his estate.

NOTE.—This case having been heard by the court before Richardson, J., was a member thereof, he took no part in the proceedings upon the order of the Supreme Court above mentioned.

(Endorsed:) Sup. Court U. S. 1874, October term. Nos. 142 & 143. The United States vs. C. V. Woodruff, &c. No. 143. Bessie E. Gaussen, ex'r, &c., vs. The United States. Additional findings. Filed 10th March, 1875.

O

OUR BEST REPRODUCTION POSSIBLE

Due To

CONDITION OF ORIGINAL



BEST REPRODUCTION POSSIBLE

Due To

CONDITION OF ORIGINAL

In the Supreme Court of the United States.

THE UNITED STATES,
vs.
C. V. WOODRUFF, A. BOUCHARD, *et als.* } No. 142.

BESSIE ELGEE GAUSSEN, *Executrix*, &c.,
vs.
THE UNITED STATES. } No. 143.

C. V. WOODRUFF & CO.,
vs.
THE UNITED STATES. } No. 166.

JULIA A. NUTT, *Executrix*, &c.,
vs.
THE UNITED STATES. } No. 223.

Appeals from the Court of Claims.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

THE UNITED STATES,
vs.
C. V. WOODRUFF, A BOUCHARD, *et als.* } No. 142.

BESSIE ELGEE GAUSSEN, *Executrix*, &c.,
vs.
THE UNITED STATES. } No. 143.

C. V. WOODRUFF & CO.,
vs.
THE UNITED STATES. } No. 166.

JULIA A. NUTT, *Executrix*, &c.,
vs.
THE UNITED STATES. } No. 223.

Appeals from the Court of Claims.

BRIEF FOR THE UNITED STATES.

On the 13th of January, 1868, the above-named C. V. Woodruff and A. Bouchard, (C. V. Woodruff & Co.,) of New Orleans, filed in the Court of Claims their duly verified petition, asking, as sole owners thereof, without *deducing* their title, to recover the proceeds of 572 bales of cotton, taken in April, 1864, in Mississippi, by officers of the United States, and afterwards sold and turned into the Treasury.

In this proceeding Mrs. Gaussen, whose original petition had been filed March 30, 1868, (Record, p. 30,) intervened, by petition filed February 13, 1869, (pp. 11 and 12;) and Mrs. Nutt, by a petition of the same date, filed *originally*, however, August 19, 1868, (pp. 6 and 11.)

A person named Montgomery seems also to have intervened. From the judgment dismissing his petition he did not appeal.

The second, third, and fourth cases named above are cross appeals by parties to the first case.

Upon the proof, Woodruff & Co. made title, by an executory contract of sale, through one Lobdell, who had bought the cotton, as part of 2,100 bales, from one Elgee the producer. At the time of the purchase from Elgee, (July 31, 1863,) both he and Lobdell were residents of rebel territory, (p. 22.) When Lobdell sold to Woodruff & Co., (March 15, 1864,) both parties were residents of New Orleans, (p. 23.)

The following bills of sale passed, at the times of the above sales, between Elgee and Lobdell, and subsequently between Lobdell and Woodruff & Co., (pp. 36, 37:)

MISSISSIPPI, *Wilkinson County:*

We have this 31st of July, 1863, sold unto Mr. C. S. Lobdell our crops of cotton, now lying in the county aforesaid, numbering about 2,100 bales, at the price of ten cents per pound, currency, the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed, Mr. Lobdell agreeing to furnish at his cost the bagging, rope, and twine necessary to bale the cotton unginned; and we do acknowledge to have received, in order to confirm this contract, the sum of $30. This cotton will be received and shipped by the

house of Dasilva & Co., New Orleans, and from this date is at the risk of Mr. Lobdell. This cotton is said to have weighed an average of five hundred pounds when baled.

W. C. GORDON,
Agent for Mr. Elgee and Chambers.
C. S. LOBDELL.

I hereby transfer all my right, title, and interest to the within contract to Messrs. Woodruff, of the city of New Orleans.

C. S. LOBDELL.

May 3, 1864.

NEW ORLEANS, *March* 15, 1864.

This contract, made this 15th day of March, 1864, between C. S. Lobdell, of the parish of West Baton Rouge, in the State of Louisiana, and C. V. Woodruff & Co., of the city of New Orleans, witnesses: That Mr. C. S. Lobdell has sold this day to C. V. Woodruff & Co. a certain contract, of which he is the owner and possessor, for the delivery of two thousand one hundred bales of cotton sold to the said Lobdell by Elgee and Chambers, by their agent, C. W. Gordon, of the county of Wilkinson, in the State of Mississippi, as will appear by reference to said contract; and the said C. V. Woodruff & Co., of New Orleans aforesaid, hereby agree to pay to Mr. C. W. Gordon, the agent of Messrs. Elgee and Chambers, at the time of receiving said cotton, the sum of one hundred thousand dollars, or ten cents per pound, currency; and, in case of not being able, from any cause, to pay said Gordon, then said C. V. Woodruff & Co. agree to pay said sum of one hundred thousand dollars, or ten cents per pound, to Mr. Victor Hebert, of No. 47 Common street, New Orleans, for account of said Elgee and Chambers, and also to pay over to said Hebert the further sum of two hundred thousand dollars, or the sum of twenty cents per pound, currency, for account of the said C. S. Lobdell; and in case the quantity of cotton should fall short, then there shall be paid ten cents per pound for account of said Elgee and Chambers, and twenty cents per

pound for account of said C. S. Lobdell, for such amount or quantity of cottou as shall be required from said Elgee and Chambers; and it is understood by both of these contracting parties that this cotton belongs to Mr. Lobdell until the consideration of thirty cents per pound upon the cotton shall be paid, viz: Ten cents per pound to or for account of Elgee and Chambers, and twenty cents to or for account of said Lobdell, as aforesaid.

V. HEBERT,
For C. S. Lobdell.
C. V. WOODRUFF & CO.

I hereby transfer all my right, title, and interest to the within contract to Messrs. Woodruff & Co., of the city of New Orleans.

C. S. LOBDELL.

May 3, 1864.

Excepting thirty dollars which Lobdell paid Elgee at the time of his purchase, no money passed at either of the above transfers; or at that by Elgee to Nutt.

Mrs. Gaussen makes title as the executrix of Elgee, the producer, asserting that his title has never been divested.

Mrs. Nutt claims as executrix of Haller Nutt, who in October, 1863, whilst resident within the Union lines, near Natchez, (p. 22,) was allowed by the military officer in command there to pass the lines, and buy the cotton in question of Elgee, then residing within the rebel lines.

The name of C. S. Lobdell does not appear as party to either of the above petitions.

In Mrs. Gaussen's petition (as originally filed, in the name of Mary A. Wells and others) reference is made to a petition then (February, 1869) standing on the docket in the name of Lobdell, (p. 10,) and on page 15

of the Record docket entries are given of a case—"Charles S. Lobdell *vs.* The United States." That case disappeared, (we are informed, was dismissed;) and when the Court of Claims decided that Lobdell was the owner of the proceeds of the 572 bales in question, subject to a lien for the price of the 2,100 bales in favor of his vendor's estate, and subject, also, to the executory contract with Woodruff & Co.—then, in order to authorize Lobdell to share in the fund, it was shown, and the court found, (Record, p. 24,) that "C. V. Woodruff & Co. were authorized by Charles Lobdell to prosecute this suit for his benefit; and C. V. Woodruff & Co. agreed in open court, by their counsel, that the court should apportion the fund in suit among the parties found to be equitably interested therein." Thereupon, the judgment given by the court was *entitled* in the names of the three cases now appealed, and also in that of "Same [W. & Co.] for the use of C. S. Lobdell *vs.* The United States." That judgment awarded to the executrix of Elgee, $137,882 62; to Woodruff & Co., *for Lobdell*, $72,365 95; and to Woodruff & Co., *for themselves*, $155,922 26. The petition of the executrix of Nutt was dismissed.

We assign for error the conclusions of law—that Woodruff & Co., Lobdell, and the executrix of Elgee were entitled to the proceeds in question—and the above judgments consequent thereon:

1. *In regard to Mrs. Gaussen as executrix, &c.:* Her first appearance in the suit as executrix was by an amendment made 8th of December, 1871. That amendment virtually first constituted as party, one whose

rights at the time were barred, (see Innerarity's case, 19 Wall., 595,) the court having no jurisdiction (12 Stats., 820) over claims from Louisiana or Mississippi *filed* after April 2, 1868.

The Protector, 12 Wall., 700.

2. *In regard to Lobdell:* He was no party to any petition pending in the Court of Claims at the time when the judgment was rendered. This is fatal to the judgment in his favor, under the acts of 1855, ch. 122, sec. 1, and 1863, ch. 92, sec. 12, which provide for the manner in which citizens may entitle themselves to sue the United States in the Court of Claims, viz:

"*The said court shall hear and determine all claims founded upon any law, &c., which may be suggested to it by a petition filed therein. * * * * It shall be the duty of the claimant in all cases to set forth a full statement of the claim, &c., specifying also what person or persons are owners thereof, or interested therein, and when and upon what consideration such person or persons became so interested.*" (10 Stats., 612.)

"Any petition filed under this act [one of general provision for the Court of Claims] shall be verified by the affidavit of the claimant, &c., stating that no assignment or transfer of said claim, or any part thereof or any interest therein, has been made, except as in said petition stated; that said claimant is justly entitled to the amount therein claimed." (12 Stats., 765.)

Besides, upon general principles, Lobdell, the owner (*technical* as well as *beneficial*) of a certain aliquot part of these proceeds, could not *authorize* Woodruff & Co., who had no connection with such part, to maintain suit, *in their name for his use.* There is no analogy between such a pretence and those cases, familiar in courts of law, where the technical owner of a thing (chose in

action or other) authorizes its beneficial owner to sue in the name of the former.

There is not only an entire absence of analogy between such cases, but the case in hand seems to be in flat contradiction of every principle which, in this respect, governs what may be called, in a general sense, the "altercations" or "contentions" of litigants. (Stephen, Pl., pp. 24, 29.) It countenances a novel sort of *attorneyship*, and "appearance."

It seems unnecessary to add, but it is nevertheless true, that, under his contract with Woodruff & Co., the validity of which he admits, and which is the basis of the judgment below, Lobdell is in fact entitled to nothing, were he a party; for he agreed with Woodruff & Co., substantially, that if the cotton fell short in weight, they were to have it, so far as he was concerned, at 30 cents per pound upon what they should receive. They received 572 bales, (271,818 pounds.) This, therefore, they were to have for $81,545 40. But they have been obliged to pay Elgee's estate, *for Lobdell's debt to it* secured by lien, by the above judgment, $137,882 62; so far, therefore, from Lobdell's being entitled to anything, he may owe Woodruff & Co. *for damages*, beyond what they get in this case, $56,337 22.

3. *As to Woodruff & Co.:* The court erred in holding that an executory contract for the purchase of *cotton* gives the purchaser any specific right to the article contracted for. Such purchaser has no standing in a court of law against the vendor *except for damages for breach of contract*; and has no standing at all in a court of equity. The Court of Claims has no jurisdiction over the question of damages between Woodruff & Co.

and Lobdell, nor has it the power to create for Woodruff & Co. a *relation of interest* in these *proceeds*, &c., when such interest is not recognized either at law or equity.

That executory contracts of purchase give no specific rights, except in cases of real estate, and some sort of personal estate of *special character* or situation, is a familiar principle.

Cuddee *vs.* Rutter, 1 Lead. Cas. in Eq., 520.
Ross *vs.* Union Pacific R. R. Co., Woolw., 26.

Unless Woodruff & Co. can establish *specific* rights as to the cotton bought of Lobdell, they cannot follow a fund arising from its sale.

We also submit that, considering Woodruff & Co.'s *conscious relation* to Lobdell in this suit at the time it was brought, their petition is no such compliance with the terms of the above statute as authorizes a recovery by them. We intend by this to assert that a *designed concealment* of the character of the claim from the court, carried to the extent (as here) of violating imperative requirements by the above acts of Congress, and of taking a false oath as to the ownership, justifies a dismissal of the case.

In answer to some of the assignments of error in the brief of the learned counsel for the estates of Elgee and Nutt:

1 and 3. The contract between Elgee and Lobdell did transfer the title of the cotton to the latter. We rely here upon the clear and learned argument in the Opinion rendered in this case by the Court of Claims.

7 Reports, 605.

2. The contemplation of the above parties (both then residents of rebel territory) that at some subsequent period (as to when, exactly, see suggestions in the brief for Elgee, &c., p. 13, top) the cotton should be transferred into the Union lines, was no violation of the laws of war, as against the United States, whatever it it may have been as to the Confederate States. A mere *contemplation* of such action, supposing the latter unlawful, did not avoid the transfer of title.

4 and 6. Suggestions (viz: as to Lobdell's, or Nutt's residence) contrary to the *findings* of the Court of Claims, are inadmissible.

5. Nutt's residence being as found below, his contract with Elgee was clearly illegal.

Even if he were then technically a *resident* of Louisiana, and only voluntarily *commorant*, for security and peace sake, at Natchez, his action in passing the lines and trading was a violation of the laws of war. Such commorancy fixed him with the character of *a friend of the United States*, and therefore—enemy of the Confederate States. He could not hold with both hare and hounds, or *flit* between the hostile parties.

Besides, the contract was executory, and upon conditions with which Nutt did not comply. (Record, p. 22.)

9. We do not understand that the Court of Claims, in ordering the parties to intervene, &c., did substantially more than bring the cases forward for *hearing together*. That court has not affected to bind the parties claimant *as against each other*, but only to hear all together, so as to enable the United States, in ridding

itself of its obligations, to do as to each what, upon the whole showing by all, seemed right. This is no obstacle to future suits between these parties for a readjustment of the quotas fixed in the present case. If the rights of these parties as against each other, is concluded by the interpleader, it is because the Court of Claims had jurisdiction of those rights. But this is denied by the learned counsel. If he be correct in this, such rights have not been affected by that proceeding, or, in other words, it is not an interpleader in the sense of this assignment.

We also object to the claim of Nutt's estate, that the petition was not filed in the Court of Claims until August 19, 1868. (Record, p. 4, top.)

GEO. H. WILLIAMS,
Attorney General.
S. F. PHILLIPS,
Solicitor General.

In the Supreme Court of the United States.

UNITED STATES *vs.* C. V. WOODRUFF, A. BOUCHARD, ET als., &c.	Nos. 142, 143, 166, and 223.

APPEALS FROM THE COURT OF CLAIMS.

Supplementary brief for the United States.

We object to the judgment in favor of Mrs. Gaussen, as executrix of Elgee, also, because the cotton when sold belonged to Elgee and Chambers, and so the *lien* was that of the same persons. Therefore the suit for the proceeds of such lien should have been in the name of Chambers, as surviving partner, and not in that of the executrix of the deceased partner.

To maintain this point, we submit that the recital in the judgment (Record, pp. 18, 19) as to what appeared by the *ex parte* deposition of Chambers, &c., is no positive finding of fact, or at least is no such a finding as is required by the rules of this court in relation to appeals from the Court of Claims. (See Rule 1.)

The *findings of fact* in the case are those only that are upon pp. 21 *et seq.* of Record.

GEO. H. WILLIAMS,
Attorney-General.
S. F. PHILLIPS,
Solicitor-General.

IN THE

Supreme Court of the United States.

THE UNITED STATES,

Appellants,

vs.

BESSIE ELGEE GAUSSEN, EXECUTRIX, &c.,

Respondent.

BESSIE ELGEE GAUSSEN, EXECUTRIX, &c.,

Appellant,

vs.

THE UNITED STATES,

Respondent's.

Statement, Assignment of Error and Points on behalf of Bessie Elgee Gaussen, as Executrix representing the Succession of Elgee.

NEW YORK:
EVENING POST STEAM PRESSES,
41 NASSAU STREET, CORNER OF LIBERTY.

1875.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty. N. Y.

IN THE

Supreme Court

OF THE UNITED STATES.

The United States,
Appellants,

vs.

Bessie Elgee Gaussen, Executrix, &c.,
Respondent,

Bessie Elgee Gaussen, Executrix, &c.,
Appellant,

vs.

The United States,
Respondents.

Statement, Assignment of Errors and Points on behalf of Bessie Elgee Gaussen, as Executrix, representing the succession of Elgee.

STATEMENT.

This action is brought by the plaintiff against the defendant to recover the proceeds of five hundred and seventy-two bales of cotton. The history of these bales, as it appears in the record, will be fully stated in a different place in this statement.

The original petition was filed on the 30th March, 1868, in the name of Mary Ann Wells and several others, including the plaintiff, as heirs of Elgee.

Record, pp. 30, 31.

On the 8th of December, 1871, the petition was amended by adding to the name of Bessie Elgee Gaussen, a statement of her representative status and capacity.

Record, p. 12, fol. 21.

On the 8th of January, 1868, Cornelius V. Woodruff and Adolph Bouchard filed their petition against the United States, wherein they claimed to recover the proceeds of *the same cotton*, allegi g that at the time of the seizure *they "owned and had in possession"* the cotton in question.

Record, p. 1.

On the 19th of August, 1868, Julia A. Nutt, as executrix of one Huller Nutt, filed her petition claiming that *he owned and had possession of the same cotton* at the time of its seizure.

On the 17th February, 1869, one Montgomery filed something that he called a bill of interpleader, claiming to have been the owner of the cotton at the time of its seizure. This petition was afterwards dismissed for failure to prosecute.

Record, p. 17.

It does not appear that the defendant, the United States, ever pleaded to the petition of Mary A. Wells and others, either before or after the amendment.

On the 7th January, 1869, the following order was made:

2157. C. V. Woodruff *et al. vs.* United States.
3103. *Charles S. Lobdell vs.* United States.
3223. Archibald Montgomery *vs.* United States.
3496. Julia A. Nutt, *ex. rx., vs.* United States.
3119. *James Syme vs.* United States.
3152. Mary A. Wells and others *vs.* United States.

"The motion filed by Mr. Hale, special counsel for the defendant, was allowed, and ordered the respective counsel for the claimants to file interpleaders therein within thirty days from this date, upon presentation of petitions in due form, and upon showing interest in the

subject matter of the claims, and the right of the party filing such petition to be heard in this court."

By the Court, Record, p. 15.

The only trace to be found in the record of the suits of Lobdell and of Syme are the titles of the cases recited in this order.

"The motion filed by Mr. Hale, special counsel," and referred to in this order, "*is not in the Record.*" On the 21st of January, in an order again enumerating the title of these causes, *with the exception of the case of Syme, which disappears without explanation*, it is "ordered that the above named parties file their several interpleaders within thirty days from this day" (Record p. 15). On whose motion or for what reason this order was made does not appear. Montgomery is embraced in it in terms, but, nevertheless, on the 11th February following, he *moves for liberty to interplead, and the motion is submitted.* (Record, pp. 15, 16, fol. 25.) On the 17th, at about the end of the thirty days, it was allowed, and what was called such a bill was filed. The same sort of pleading, in obedience to these orders, was filed within the time by Wells and others, and by Nutt. (Record, pp. 9, 11.) *Both Syme and Lobdell have now unaccountably disappeared.* Woodruff and Bouchard filed no so-called bill of interpleader at all, and so far as appears, *paid no attention to the order.*

The Government seems to have taken no notice whatever of these extraordinary pleadings, filed, it appears, at its instance. Indeed, after they had been filed, no one seems to have known what to do with them. *No further reference is made to them, and nothing was done on the footing of them.*

On the 23d March, 1870, another singular order was made. It is entitled in the cases of Woodruff, Montgomery, Nutt and Wells, and is as follows; "And now, March 23d," 1870, ordered that each of the claimants in the above *consolidated cases* show cause before this court

on the first Tuesday of April, next, why the *consolidated cases* should not then and there be tried, or their respective petitions be dismissed, and on failure to show cause, the said consolidated case of C. V. Woodruff *et al, vs.* the United States will be proceeded with, and the petitions of the claimants not then appearing will be dismissed" (Record p. 16). This is the first time the cases are spoken of as *consolidated causes.* On whose motion this order was granted does not appear. The claimants are *all* directed by name to show cause, etc. But whether they do or not, it seems that *the case of Woodruff was to be proceeded with.* It must be admitted that the order is not quite as clear in its meaning as it might be. Afterwards on the 5th of April, 1870, the petitions of Montgomery and of Wells were dismissed (Record pp. 16, 17). On the 6th February, 1871, by an order of the court, case of Wells and others was restored to its place on the docket (Record p. 17). On the 16th January, 1872, the argument of the cases of Woodruff, Nutt and Wells, was commenced and suspended, the court then making an order that on the 5th March further testimony might be introduced in open court (Record p. 18).

From the date of the judgment (Record p. 19), the cases seem to have been heard in May, 1872

It is recited in the judgment that the cases came on to be heard "*on the original petitions and pleas between the respective parties, claimants, and the defendants, and also on the intervening petitions and pleadings between the respective claimants concerning their adverse interest in the fund, and also upon the evidence of the respective claimants, both as it regards the defendants and between each other,*" etc.

Record, p. 18.

By the findings of the court it appears that "by an order of this court *these cases were heard together.*"

From all which it appears that the parties had finally succeeded in getting the cases into such a condition

that neither counsel or court knew what to do with them, and it resulted simply in their all being heard at the same time on the aggregate mass of matter that had accumulated.

From this material resulted a judgment as formless and shapeless and as independent of all rules of law

*The views herein expressed, in regard to the *practic* vas the court in this case, on more careful considerat ant seem to require modification.

The order of interpleader was doubtless irregular, b to no action was had upon it. Consolidation, in the tech xes cal sense, is inapplicable to cases so situated; but thoug ies the term is used they were not in fact consolidated. be

In the sequel they were merely *heard together*, the testi- mony having in each case been taken in the usual and a regular way. or

The findings of fact, therefore, are findings on evidence of duly taken of the facts applicable to each, and all the cases. This is enough to enable the court to see the right of the matter, and direct the entry of such new suits as st should have been rendered. of

Roach *vs.* Hulings, 16 Pet., 319. o

Parks *vs.* Turner, 12 How., 39. ,

Downey *vs.* Hicks, 14 How., 240. e

Railroad Co. *vs.* Linsday, 4 Wall., 650. n

Stockton *vs.* Bishop, 4 How., 155.

The error is only in the judgment, and may be corrected. -

Insurance Co. *vs.* Boykin, 12 Wal., 433. h

In respect to this question of practice the case is not un- ss like the Case of the Ouachita Cotton, 6 Wal., 54. n-

That the course adopted bears some resemblance to ad- as miralty practice is no objection. U. S. *vs.* Barnes, 12 In Wal., 433. In both cases the suit is, so to speak, again on a fund.

. One

William C. Gordon, as agent of Elgee & Chambers, executed and delivered to one Chas. S. Lobdell a writing, of which the following is a copy:

"Mississippi, Wilkinson County.

"We have this 31st of July, 1863, sold unto Mr. C. S. Lobdell our crops of cotton now lying in the county aforesaid, numbering about 2,100 bales, at the price of ten cents per pound, currency, the said cotton to be delivered at the landing at Fort Adams, and to be *paid for when weighed*, Mr. Lobdell agreeing to furnish at his cost the bagging, rope and twine necessary to bale the cotton unginned, and we do acknowledge to have received, in order to confirm this contract, the sum of $30.

"This cotton will be received and shipped by the house of Dasilva & Co., New Orleans, and from this date is at the risk of Mr. Lobdell. This cotton is said to have weighed an average of five hundred pounds when baled."

See Supplemental Brief

It is found (Record, p. 22, fol. 40) that at the date of this agreement Lobdell was "*a citizen and resident of West Baton Rouge, in the State of Louisiana*' and that "*Elgee and Chambers were citizens and residents of Alexandria, in that State.*"

The pretended assignment of this agreement (record, fols. 47, 48, 49) under date of May 15th, 1864, shows on its face that it was made "across the lines" between Lobdell, resident of Baton Rouge, within the lines of the Confederate army, in the hostile territory of a rebellious State, within which the cotton also was. And Woodruff and Bouchard received the assignment within the lines of the Union army and on territory that had been restored to the possession and jurisdiction of the Federal government. Deferring for the present the observations which this state of facts call for, it may be said in passing that this pretended assignment would seem to be void.

It is found that after the making of the agreement between Gordon and Lobdell, the latter employed one J. M. Morris, living near where the cotton was stored, to watch and take care of the cotton, and paid him therefor; that this person continued to watch and take care of the cotton till it was seized.

It does not appear that the actual charge or custody of the cotton was changed, or if so, that it was done with the knowledge and consent of Elgee & Chambers or either of them, or when or under what circumstances Morris was paid by Lobdell. There is no evidence tending to show that the possession of the cotton was changed at all; indeed, as will be pointed out later, the findings show that it was not.

There is no weight due, therefore, to this fact in determining the rights of Elgee and Lobdell, respectively, under this agreement. Indeed, facts that have come to light since the trial below, show the statement, as to the employment and care of Morris, to be pure fiction; and, moreover, that the pretended sale to Lobdell is also pure fiction. But taking the findings as they are it appears plainly enough that the unfortunate owner of the cotton, anxious to protect it from destruction, knowing that to this end the fact of his loyalty or disloyalty was quite immaterial, and that everything depended upon personal influence and management, either consented that Gordon should make this arrangement with Lobdell, not as a *bona fide* executory contract of sale, but as a device and cover to protect the cotton, or else Mr. Elgee regarded the contract with Lobdell as abandoned, as indeed it manifestly was by all parties as will be pointed out hereafter.

Afterwards, on the 8th of October, 1863, Mr. Elgee made a conditional agreement with Holmes, as the agent of Nutt, for the sale to the latter of the same cotton as stated in the findings.

As before stated, on the 15th March, 1864, one V. Hebert, described as of 47 Common street, New Orleans, purporting to act for Lobdell, who was still within the rebel lines, entered into the agreement with C. V. Woodruff & Co., at p. 36 of the record, fo. 47.

It will be observed that the agreement does not purport to be a sale of the cotton, but a sale of *the contract*

of Lobdell with Elgee & Chambers. The agreement witnesses "That Mr. C. S. Lobdell has sold this day to C. V. Woodruff & Co. *a certain contract of which he is the owner and possessor for the delivery of two thousand bales of cotton.*" * * * Here is an express recital that the contract of sale is executory; that the cotton has not been, but is to be, delivered; in other words, that no sale has been consummated, and that an unexecuted contract of sale is assigned.

The closing paragraph does not subtract from the force of this recital; on the contrary, it rather adds to its force. It is as follows: "It is understood by both of these contracting parties that this cotton belongs to Mr. Lobdell until the consideration of thirty cents per pound upon the cotton shall be paid, viz., ten cents per pound to or for account of Elgee & Chambers and twenty cents to or for account of said Lobdell, as aforesaid." That is to say Lobdell retains absolute right &c &c

Here is, to say the least, a distinct provision that no *interest in the contract shall pass* until these payments are made, including and embracing a recognition of the fact that no title to anything can pass till the payment to Elgee of the price mentioned. Moreover, as both Elgee and Lobdell were within the confederate lines, it could not have been executed without a fragrant violation of law; and hence, because this was contemplated, and was an essential part of the contract, it was for this further reason void.

See however Sup Brief on this Point

Resuming the thread of the history of this cotton, the further fact (already referred to in a general way) appears by the finding that, in the month of October, 1863, one Haller Nutt, through his agent, Holmes, had a transaction with Mr. Elgee in respect to it.

Nutt describes himself in his petition as having been ruined in fortune by the war. In this situation, with a view, probably, to repair his broken fortunes by means of his real or supposed interest with the Federal authorities, he obtained a permit for one Holmes to cross the Federal lines into the Confederacy. Nutt

at the time was residing at Natchez, and within the military lines of the Union forces. Holmes, it seems, went on an unlawful expedition to purchase cotton, but without money or credit. He met Mr. Elgee; the result of that meeting was the agreement stated in the findings (fol. 41).

This agreement with Holmes was probably made in consequence of some plausible representation on his part, as to the ability of Nutt to get the cotton out and ship it to England for a market. Assuming the agreement to have been intended as a *bona fide* agreement, and something more, therefore, than another devise to save the cotton from seizure and destruction, it was clearly void, having been made in direct violation of the non-intercourse act as well as the general principles of public law. Moreover, Elgee, some two months later, declared it to be abrogated in consequence of the failure of Nutt to carry it out or take any steps to that end.

Record, p. 22, fol. 41.

In fact no act was ever performed looking to the execution of this pretended agreement.

Afterwards, on the 2d day of April, 1864, the cotton then being in the same place, part of it, viz., 572 bales, was seized by one B. F. Camp, claiming to be an agent of the Treasury Department, and to act in behalf of the United States. The remainder was about the same time destroyed by the confederate troops.

Record, p. 23.

It is found that Morris objected to the taking of the cotton, that it had been purchased by Woodruff & Co., and that *Gordon, as agent of Elgee, claimed to have possession of it*, and said it had been purchased by a firm in New Orleans. Great significance is due to the acts of the parties at this time and under these circumstances, but none at all to their declarations, for it would be most natural for them, or any of them, to make any statement as to ownership that would be most likely to protect the cotton.

Let us see what followed. Do Woodruff & Co. take any measures to assert a title to the cotton? Do they or does any one for them follow and claim it? Not at all. Does Lobdell assert his right to it in any manner? Not at all. But Gordon, the agent of Elgee, does follow the cotton to Natchez. He informs Gen. Tuttle, apparently a person in authority, that the cotton is not confederate or abandoned cotton, *but that it belonged to J. K. Elgee.* Gordon could obtain no satisfaction.

Elgee still pursued the cotton, and *no one else took any interest in it or asserted any claim to it.* On the 11th of June, 1864, he brought in the Circuit Court for St. Louis county, Mo., an action of replevin against Oliver S. Lovell, who, as agent of the U. S., was then in possession of the cotton. This action was removed to the Circuit Court of the U. S. for the District of Mo. Pending this suit the stipulation referred to in the findings was executed. The stipulation was between Elgee and the Government. It provided for a sale of the cotton and an investment of the proceeds to await the determination of the suit. The case was decided against the plaintiff Elgee, but when, the record does not show. Afterwards, as before stated, this action was commenced on the 30th March, 1868.

No communication was ever had between Elgee and Chambers, or either of them, and Lobdell, on the subject of this cotton, after the date of the pretended agreement on the 31st July, 1863. Nor was any act done in the premises by Lobdell. No communication on the subject of the cotton was ever had between Elgee and Chambers, or either of them and Woodruff & Co.; nor was any act done by the latter at any time in respect to the same.

The same is true of Nutt.

The commencement of the actions of Woodruff & Co. and of Nutt against the U. S. in 1868 is the first assertion by either of any interest in the cotton. They probably thought it would be as well to take part in the general scramble, and trust to luck and chance for the result.

Nothing would seem to be clearer than that if their supposed agreements with Lobdell, and the one between him and Woodruff & Co., were ever understood to have any validity, *they were entirely abandoned by all parties soon after they were made. The same is true of the Nutt agreement.*

Assignment of Errors.

1. The court erred in not giving judgment in favor of Bessie Elgee Gaussen, executrix, etc., upon the facts found, for the whole amount of the proceeds of the cotton in question paid into the Treasury of the United States as the proceeds of the sale thereof.

2. The court erred in giving judgment in favor of the said Woodruff & Bouchard for any part of the proceeds of the said cotton.

3. The court erred in giving judgment in favor of the said Lobdell for any part of the said proceeds of the said cotton.

4. The court erred in not deciding that the pretended agreement purporting to be an assignment by Lobdell of his contract with Elgee & Chambers to Woodruff & Co. referred to as Exhibit "B" in the findings of the court was illegal and void, as having been made in violation of the statute of the United States known as the Non-Intercourse Act, and the several amendments thereto, and of the general principles of law.

5. The court erred in not deciding that upon the facts found the said Woodruff & Bouchard had no title to the cotton in question, or interest in the same sufficient to entitle them, or either, to have or maintain said action.

6. The court erred in ordering, deciding and directing that the said Woodruff and Bouchard, Julia A. Nutt and Mary A. Wells and others, should interplead in respect of their several interests in the said cotton on the alleged motion to that end made on behalf of the defendant.

7. Court erred in consolidating the said causes, and treating and trying the same as consolidated causes, and in apportioning, and distributing the proceeds of the said cotton, theretofore paid in to the Treasury of the United States to and among the several parties plaintiff as in and by the judgment and decision of the court was done.

8. The court erred in deciding as a conclusion of law, from the facts found, and in adjudging that the said Woodruff & Bouchard were entitled to a specific performance of this said pretended contract with the said Lobdell.

9. The court erred in not finding and deciding that the said pretended contracts between the said Elgee or Elgee & Chambers, and the said Lobdell, and between the said Lobdell and the said Woodruff & Bouchard had been rescinded, abrogated, and avoided.

10. In deciding upon the assumption that the pretended sale by the said Elgee & Chambers to the said Lobdell, was a good and valid sale, and passed title to the said Lobbell and that the court had power to distribute and apportion the proceeds in question in such a manner as to give to the representative of the said Elgee the purchase money; the court erred in not deciding and adjudging that the said representative of Elgee was entitled to interest on such purchase money from the date of the said agreement or from some reasonable time subsequent to such date.

POINTS.

I.

There was no error in allowing the amendment by which Mrs. Gaussen, already a plaintiff in her capacity of heir, became plaintiff in her capacity as executrix.

1. No objection was made [illegible]

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has always declined interfering in such cases." From the opinion in

Wright *vs.* Hollinsworth, 1 Pet., 168.

Conceding that the question of time of filing a petition is *submodo* a jurisdictional question, that point does not arise; the petition was filed in time, and by the proper persons; and the only question is as to the power of the court to allow an amendment stating, as a fact, the appointment of one of those persons as executrix and this depends on general principles.

This doctrine is of universal acceptation.

Thompson *vs.* Kessel, 30 N. Y., 383.
Scales *vs.* Cheese, 12 M. & W., 685.
Webster *vs.* Emery, 10 Exch., 900.
Phillip's Practice, 184.

2. Were the rule otherwise, the failure to take the objection below would preclude the defendant from raising it here for the first time. The result of this in the case at bar, would be to enable the defendant by way of *suggestion* to avail of the Statute of Limitations, never before even suggested, much less pleaded.

3. But considered on its merits, the allowance of the amendment was proper and entirely in accordance with practice and precedent.

The power to allow amendments, conferred by the Act of 1789, is possessed by the Court of Claims.

Molina *vs.* U. S., 6 Ct. Cl. R., 275.

No remedial statute on this subject, passed before or since in this country or in England, is more general, comprehensive and far-reaching than this. Its great object was to secure the administration of substantial justice in the particular case, regardless of any defect or want of form, to cure which, when needful, the court "shall and may * * * from time to time amend all and every such imperfections, defects and want of form." The authorities are very numerous in which amendments of precisely the same nature have been allowed under statutory authority less comprehensive, and on the general principles of the common law as modified by the English statutes. Some of the most pertinent are cited below.

On the death of Mr. Elgee the right of action vested *in his succession;* whoever might be the nominal plaintiff, the succession was the real plaintiff. Whoever might be the nominal representative, the real and beneficial interest would be and remain the same.

The action was properly brought in the first instance. Heirs under the civil code represent the succession unless and until an executor or administrators intervenes. The amendment introduced no new cause of action—no new right, as against the defendant, was set up, and, indeed, no subsequently acquired interest in the plaintiff. The cause of action remained the same. The rights of the succession in the premises remained the same. The petition in this respect was not amended or changed. After the amendment, the subject matter was claimed in the same right as before, namely, the rights of the succession.

As before stated, the judgment, when recovered, would enure to the benefit of the succession in the same manner. Indeed, the plaintiff was already on the record. The change was merely nominal, conferring the

right to continue the prosecution of the action by the plaintiff in her quality of executrix instead of that of heir, an official status which meantime, by operation of law, she had acquired, and then to dismiss the supernumerary parties plaintiff.

Leaving the cause to proceed as it had proceeded, in behalf of the succession, against the United States, in the same manner and for the same object.

The precedents for such amendments, having for their object the proper discription of a party plaintiff, in view of some subsequently acquired representative capacity, or to place on the record as plaintiff the proper person to represent, in an official capacity or otherwise, the cause of action, are very numerous, both in England and in this country. The Cowan Infant's case, 5 Ct. Cl., 106, and Mrs. Stanton's case, 4 Ct. Cl., 456, are directly in point. In La Banca Nazionale, &c., *vs.* Hamburger, 2 H. & C. (Exchequer, 329); it appearing that the bank was not a body corporate, with power to sue, the proceedings were amended by inserting the name of a director.

The same thing was done in Bank of Havana *vs.* Magee, 20 N. Y., 355, the court saying in substance that such amendments were a matter of course in courts of original jurisdiction and not subject to review.

Such amendments are frequently allowed for the express purpose of saving the cause of action from the operation of the Statute of Limitations. As in the case of Brown *vs.* Fullerton, 13 M. & W., 556, where an official assignee was, by amendment, made a party plaintiff, "*in order to save the Statute of Limitations.*"

Exactly the same thing in principle was done in

Horton *vs.* Inhabitants of Stamford, 1 Crom. & M., p. 772.

And in Coombs *vs.* Bristol & Exeter Railway Co. 1 Foster & Finlason, p. 206.

In Eccles *v.* Cole, 8 M. & W., 536, an amendment was allowed, changing the cause of action *from debt to*

assumpsit on the express ground of saving the bar of the Statute of Limitations.

In Dixon *v.* Dixon, 19 Iowa, 512, the name of a firm was inserted as plaintiff in place of that of an individual.

In Martel *v.* Somers, 26 Texas, there was a substitute of one person for another as plaintiff, on the ground that the latter was the real party in interest.

In Winthrop *v.* Farrar, 11 Allen, 398, the inhabitants of a town were substituted by amendment as plaintiffs in place of the selectmen.

In Youcum *v.* The Town of Waynesville, 39 Ill., 220, in an action under a *penal statute*, the town of Waynesville was substituted plaintiff by amendment in place of the commissioners of highways of the town.

It is hardly necessary to say that the class of cases in which amendments have been refused, where it was sought to add a new cause of action, and especially that class where the amendment has been refused on the ground that the new cause of action sought to be introduced was barred by the Statute of Limitations, have no bearing.

II.

Proceeding in the next place to the consideration of the errors assigned by the executrix, representing the succession of Elgee, the first point relates to the nature of the judgment rendered.

1. The position in these cases of the United States as a defendant is the same as that of any other defendant in a judicial proceeding.

2. It has been observed that the Court of Claims is not bound by any particular form of pleading.

It is presumed that this observation was intended to apply to mere matters of *form*, properly so-called, and that it was not intended to sanction any departure from those general rules and principles according to which justice is administered at law and in equity, and which go to the substance, nature and extent of the remedy. If the court possesses chancery powers, and may give equitable relief, on doing so, it must be governed by the general rules, principles and established forms applicable to this branch of jurisprudence. On the other hand, in a case that involves common law rights and remedies, the court must proceed according to the general course and practice of the common law. It would seem to be unnecessary to elaborate this proposition. These general rules and principles and established forms exist because they are necessary to the proper administration of justice, and they cannot be dispensed with by any judicial tribunal.

3. Proceeding, then, from these premises, the next inquiry concerns the status of these several cases in the Court of Claims. The act under which they were respectively brought provides, among other things, that "any person claiming to have been the *owner* of any such captured or abandoned property may, at any time within two years, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of said court of *his ownership* of said property," etc., etc.

From which it appears that the *owner* of the property at the time of its capture, and the owner only, can have or maintain the action given by the statute, and can only recover *on proof of ownership*. The statute does not define who is to be regarded as owner, or by what evidence his title is to be established. Hence ownership must be established according to the prin-

ciples of the common law. The person who in legal intendment sustains the injury by being deprived of the possession, the person who would have the right to maintain trespass or trover, and recover the value of the property in case the taking were tortious, is the person who alone can maintain the action given by this statute. Of course there may be several plaintiffs claiming under a common title as tenants in common or joint tenants, in which case they must, on general principles, all join. There were several persons in this case, *each of whom however claimed to have been the owner of this cotton in his own right*, and each of whom brought his separate action against the defendant, founded on that claim. The numbers, by the processes of judicial elimination, dwindled down to three. The succession of Elgee, Woodruff & Bouchard and Nutt. Elgee raised the cotton, and was confessedly the owner, unless either one of the other two parties are able to make out that he had previously transferred a title to them by a valid contract of sale; each in fact claims in hostility to the other, a right based upon an alleged title to the property in question derived from him. The actions, are in their nature and in substance, actions of assumpsit, founded on this statute. What course is open to the defendant in such a case? It is to be borne in mind that the statute does not prescribe any. It merely authorizes an action against the government. The government, therefore, stands on the same footing as any other defendant, and the case must be governed by general principles.

What then are the general principles applicable to such a case? If a defendant is vexed by numerous actions *ex-delicto* for the same cause, he must defend each separately, unless the case is within the equitable jurisdiction of a court of chancery to restrain a multiplicity of suits. And if he is sued *ex-contractu* by numerous plaintiffs in separate suits all based upon the same cause, of action *if he defends as against all denying the right of each*, he is exactly in the same

situation. On the other hand, if the same sum of money or the same specific thing is claimed from him by several persons each in his own right, and the only question is to whom payment or delivery may safely be made, the defendant claiming no interest and being substantially a stakeholder, in such a case, either before or after actions are brought against him, he may have his equitable action or suit against all claimants to settle the right. He may have his bill of interpleader to which each claimant is duly made a party defendant. If the bill on inquiry appears to have been well filed an interlocutory order passes, under which the money or thing is brought into court, and the plaintiff is dismissed from the proceeding. The cause then proceeds as between the different claimants, the defendants, each of whom as against every other is a plaintiff, and the cause proceeds on that principle. Proofs are taken as in other causes, and each party has the right of cross-examining the witnesses of the other and opposing all his proofs in the usual way.

Story's Eq. Pl., sec. 291, *et seq.*
Bartons' Suit in Eq., p. 68.
Danls. Ch. Pr.

It is unnecessary to point out that that no proper steps were taken below to require an interpleader on the part of these several claimants, for there is in the record no pretense of any. The fanciful order taken by "special counsel" for the government below is quite unknown to any system of practice, and indeed no action appears to have been had upon it.

Attention may as well, in this place and connection, be also called to what appears to have been a sort of consolidation of these causes below. It is hardly necessary to point out that the rules and principles that govern the consolidation of actions have no relevancy to causes situated as the cases at bar were situated. Consolidation is only allowable when more than one action is brought by the *same plaintiff* against

the same defendant, at the same time, for causes of action which might have been joined in the same declaration, and this is allowed to save expense.

Cecil *v.* Briggs, 2 Term Rept., 639.
Wilkinson *v.* Johnson, 4 Hill, 46.
Dunning *v.* Bk. of Auburn, 19 Wend., 23.
Dunn *v.* Mason, 7 Hill, 154.
Wilkinson *v.* Johnson, 4 Hill, 46.
Pierce *v.* Lyon, 3 Id., 450.
The two latter cases hold that where the defendant proposes to defend either action, consolidation is of doubtful propriety.

Here again the court seems in the sequel to have decided that neither the principles of consolidation or of interpleader were applicable to the situation, and so the judgment recites that by order the causes were *heard together*. This was well enough. But merely hearing the causes together properly could have resulted only in a judgm nt in favor of one or the other plaintiffs against the defendant, whereas in fact the judgment would seem to have been the product in some way not exactly apparent, of the application of the equitable doctrine of specific performance without action or parties, of the equitable doctrine of interpleader without bill, pleading, proofs or parties, and of the common law principle of consolidation of actions, without any subject matter for its application, and the general principles governing *arbitrations*, but without any submission to arbitration. All of which seems to have been due to a singular confusion of ideas on the part of the relays of attorneys who from time to time represented the Government in the court below. Not the least singular part of the judgment is that which adjudges to Lobdell, a person not a party to any proceeding before the court, a sum of between fifty and sixty thousand dollars!! He might or he might not have had a cause of action touching the

premises of some kind against some one, but he had no *action* against any one, and certainly no action or cause of action against the United States.

In short, as a consequence of the general confusion, the necessary result of the disregard of all regular rules of practice on the part of the representatives of the Government below, a judgment was rendered on a *pooling* of all the evidence in all the cases without regard to the parties between whom it was taken, and on the principle of a general and informal arbitration.

III.

If the foregoing propositions are well founded, then it follows that each case is to be considered on its own merits. And so considered, if anyone was or is entitled to a judgement against the defendant, it was and is the representative of Elgee's succession.

It must be determined which if either of the parties plaintiff were the owners of the cotton at the time of its seizure, and the party in whose favor that question is decided is entitled to judgment for the full amount of the proceeds. The Court of Claims has nothing to do with any executory or executed contracts between the parties touching the subject matter except in so far as in each case it may be necessary to consider these in order to determine *who was in point of law the owner of the cotton* at the time of the seizure. If either party has any right of action against the owner he must enforce it in the appropriate tribunal and against the proper party. It is a matter with which the United States has no concern and over which the Court of Claims has no jurisdiction.

There are no separate findings in the cases. Having regard to the manner in which the cases were dealt with below, it is, perhaps, doubtful whether this court can or ought to decide upon the rights of the respec-

tive parties upon these general findings. Upon the assumption, however, that the court may do this, it is submitted that Elgee alone was the owner of the cotton within the meaning of the statute at the time of its seizure, and that his succession, therefore, is alone entitled to recover the proceeds. In determining this question on the findings as they stand, it is necessary, among other things, to consider the validity of the claims set up by Woodruff & Bouchard and by Nutt, and incidentally the contract alleged to have been made with Lobdell; for if, on the findings, either of these parties, in point of law, were the owners of the cotton at the time of seizure, then Elgee was not, and his succession cannot recover.

There is something very repulsive to one's sense of right in each of these pretended claims of Woodruff & Bouchard and of Nutt. Neither is founded upon any consideration; neither of them has ever paid or offered to pay a dollar to Mr. Elgee in his lifetime, or to his succession, since his decease, for the property in controversy. Not a single step has been taken, or act done, by any of them during all the years that have elapsed, towards the execution of the pretended contracts with him, not even a communication of any kind on the subject has been had with him or his succession. By what juggling then, have they, or some of them, obtained this property? By what juggling, have Elgee and his heirs ceased to be the owners and been put to a worthless right of action against some of these adventurers with even that barred by the Statute of Limitations? In the name of honesty and decency as well as law, what pretense of legal claim can they set up to recover about a half million dollars proceeds of the property in question, on the footing of owners for distribution among themselves and their confederates in the prosecution of this claim? It is a monstrous claim, having about it all the earmarks and the odor of fraud. On the other hand, look at the situation of Elgee's succession. It is a situation that appeals persuasively to every sen-

timent of justice and honesty. The cotton was his in his lifetime ; he raised it on his plantations. It represented a value of over a million of dollars. Three-quarters of it was burned to ashes by armed rebels, and the remainder seized by the United States. Neither he in his lifetime nor his succession since his decease have ever received a dollar on account of it. Unless they have the right to recover the proceeds of the portion that was taken by the government, they never can receive a dollar. If they ever had a right of action against Lobdell or his assigns, or even Nutt, who says he is a beggar, (which is probably the state and condition of all of them), it has long since been barred by the Statute of Limitations. But of what avail would a right of action be against such people? What mockery to suggest such a remedy! The situation of the only parties who have any just honest or eqitable claim against the government is, indeed, deplorable if they are not entitled to recover this action as owners of the property at the time of its seizure.

But to proceed.

In the first place then, it is, for the following reasons, submitted that the contract with Lobdell did not divest the title of Elgee to the cotton at the time of its execution, and that it was not at any time subsequent thereto divested in pursuance of that contract.

1. The following is the contract in question :

"Mississippi, Wilkinson County.

"We have, this 31st day of July, 1863, sold unto Mr. C. S. Lobdell our crops of cotton, now lying in the county aforesaid, numbering about 2,100 bales, at the price of ten cents per pound *currency ; the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed, Mr. Lobdell agreeing to furnish at his cost the bagging, rope and twine necessary to bale the cotton unginned.* And we do acknowledge to have received, in order to confirm this contract, the sum of thirty dollars. This cotton will be received and shipped by the house of Dasilva & Co., New Orleans, *and from this date is at the risk of Mr. Lobdell.*"

It is important to observe that the sale is of *about* 2,100 *bales*, and is an *entire contract* for about that quantity; that it is to be paid for by weight, *and the weight is not ascertained*; that part of it is not baled, and *the purchaser is to furnish the materials for baling at his own expense*; that *it is to be delivered at Fort Adams and* PAID FOR WHEN WEIGHED.

What effect, if any, is due to the words "from this date is at the risk of Mr. Lobdell," will be considered a little later.

2. There are certain rules now well established and quite universally recognized for determining when the contract of sale is complete and executed, and the title transferred from the seller to the buyer. Among them are the following, cited from Mr Benjamin's treatise on the law of sales:

> *First.*—"Where by the agreement the vendor is to do anything to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them, or, as it is sometimes worded, into a deliverable state—the performance of those things shall in the absence of circumstances indicating a contrary intention be taken to be a condition precedent to the vesting of the property."
>
> *Second.*—"Where anything remained to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things also shall be a condition precedent to the transfer of the property, although the individual goods be ascertained and they are in the state in which they ought to be accepted."
>
> Benjamin on Sales, Am. Ed., secs. 318, 319 and notes.

Logan v Le Mesurier 6 Moore P.C. 116

"*The owner must intend to part with his property*

and the purchaser to become the immediate owner—their two minds must meet on this point."

Morton Judge in Mason *agst.* Thomson, 18 Pickering, 305.

In Foster against Ropes, decided in the Supreme Court of Massachusetts in 1872, not yet reported, but referred to in the edition of Benjamin on Sales last cited, at page 249, the court say in referring to the subject: "In all cases, however, the intention of the parties as to the time when the title "is to pass can be ascertained only from the "terms of the agreement as expressed in the language and conduct of the parties and as applied "to known usage and the subject matter. It "must be manifested at the time the bargain is "made—the rights of the parties under the contract cannot be affected by their undisclosed "purposes or by their understanding of its legal "effect."

In Gibbs *against* Benjamin, 45 Vermont, 124, Judge Redfield, says: "The principle is well settled and uniform in all cases that when anything "remains to be done, *by either or both of the parties* "precedent to delivery, the title does not pass, and "so inflexible is the rule that when the property "has been delivered, if anything remains to be "done by the terms of the contract before the "sale is completed the property still remains in "the vendor; the contract must be executed to "effect a complete sale, and nothing further to be "done to ascertain the quantity, quality or value "of the property."

To the same point are Hutchins *vs.* Gilchrist, 23 Vermont, 88; Hale *vs.* Huntley, 21 Vermont, 147.

In Fuller *vs.* Bean, 34 New Hampshire, Bell, judge, says "If the goods are sold by number, "weight or measure, the sale is *prima facie* not "complete till their quantity is ascertained, and if

" they are mixed with others, not until they are " separated and designated."

The same rule was stringently applied in Prescott *agst.* Lock, 51 New Hamp., 94.

The English courts admit ~~much~~ even less latitude of construction than the American, and allow less scope for presumption as to the intentions of the parties, adhering more closely to the letter of the contract.

" In Hanson *against* Meyer, 6 East, 614, the de- " fendant sold a parcel of starch at £6 per cwt., " and directed the warehouseman to weigh and " deliver it; part was weighed and delivered and " then the purchaser became bankrupt, whereupon " the vendor countermanded the order for deliv- " ery of the remainder and took it away. In an " action for trover brought by the assignees of the " bankrupt purchaser, Lord Ellenborough said that " the act of weighing was in the nature of a condi- " tion precedent to the passing of the property by " the terms of the contract because the price is " made to depend upon the weight." Benjamin on Sales, Am. Ed., sec. 321.

To the same point and equally strong are Zeagury *vs.* Farnell, 2 Camp., 240; Simmons *vs.* Swift, 5 B. & C., 857, cited in Benjamin on Sales, Am. Ed., sec. 323.

In this edition the authorities on the subject, both English and American, are brought down to a very late period and fully commented upon in the text and notes, rendering a more detailed reference to them unnecessary, see chap. III, page 245.

Third.—" Where the buyer is by the contract " bound to do anything as a consideration either " precedent or concurrent on which the passing " of the property depends, the property will not " pass until the condition be fulfilled, even though

" the goods may have been actually delivered into " the possession of the buyer."

The authorities in support of this proposition are exceedingly numerous. Benjamin on Sales, Am. Ed., sec. 320 and notes. Again, " Where " goods are sold at a fixed price to be paid on a " certain day, and delivery is made upon condi- " tion, express or implied, that *until the price is* " *paid the title is to remain in the vendor, payment is* " *a condition precedent, and until performance, the* " *property is not vested in the purchaser.*"

This, of course, is a necessary deduction from the general propositions before cited from Mr. Benjamin, and by him taken from the English authorities. There is no conflict on this point between the English and American authorities. Very many of each are cited in the notes to secs. 320 and 321 :

" Where payment and delivery are agreed to be " simultaneous, and payment is omitted, evaded " or refused by the purchaser, upon getting pos- " session of the goods, the seller may immediately " reclaim them. Leedom *vs.* Phillips, 1 Yates, 529 ; " Harris *vs.* Smith, 3 Serg. & R., 20 ; Palmer *vs.* " Hard, 13 John., 434 ; Marston *vs.* Baldwin, 17 " Mass., 606 ; Levin *vs.* Smith, 1 Denio, 571 ; Con- " way *vs.* Bush, 4 Barb., 564 ; Henderson *vs.* " Lauck, 21 Penn. St., 359 ; Deshon *vs.* Bigelow, " 8 Gray, 159 ; Ferguson *vs.* Clifford, 37 N. H., " 86 ; Paul *vs.* Reed, 52 N. H., 136 ; Adams *vs.* " O'Conner, 100 Mass., 515, 518 ; Tyler *vs.* Free- " man, 3 Cush., 515, 518. *And where nothing is* " *said about payment at the time of the purchase the* " *law presumes that the sale is for cash, and in such* " *case payment and delivery are concurrent acts.*

" Southwestern Freight, &c., Co. *vs.* Plant, 15 " Missou., 517 ; Scudder *vs.* Bradley, 106 Mass., " 422 ; Goldsmith *vs.* Bryant, 26 Wis., 34. * * * * " and the title to the goods will not vest, unless " such payment is made or waived. Whiting *vs.*

" Eaton, 15 Gray, 225 ; Farlow *vs.* Ellis, 15 Gray, " 229 ; Stone *vs.* Perry, 60 Maine, 48 ; Paul *vs.* " Reed, 52 N. H., 136, 138 ; Russell *vs.* Minor, 22 " Wend., 659 ; Hirschorn *vs.* Canney, 98 Mass., " 149 ;" Benjamin on Sales, sec. 321 and notes. In the case at bar it is not necessary to rely on this legal implication from silence. It is clearly expressed that payment is a condition precedent to any change of title.

3. Referring now to the terms of this contract and to the foregoing canons of construction, it will be observed that several things were to be done before a title to the cotton could vest in Lobdell, and that there is no finding by the Court of Claims that any of these things were done.

The cotton was not in a condition for delivery, part of it not being baled, and for the baling of which Lobdell was to furnish the materials. The number of bales was not ascertained therefore, and it was not weighed. It was to be delivered by the seller at Fort Adams, no other delivery being contemplated or authorized by the terms of the contract, and, most material of all, *it was to be paid for when weighed at that place.* None of these things were done, and it seems, therefore, absurd to contend, in view of the authorities, that any title to the cotton in question vested in Lobdell.

A careful examination of the findings will show that there was at no time any delivery to Lobdell or change of possession of the cotton, although if it were otherwise this circumstance would be immaterial.

It is found at page 22, fol. 40 of the record, that immediately after the sale Lobdell employed J. M. Morris, living near where the cotton was stored, " to *watch and take care* of the cotton * * * * and Morris continued his care of the cotton till it was taken possession of," &c.

It is also found (page 23, fol. 41) that Morris was informed of the sale by Lobdell to Woodruff & Co., and thereafter continued *such custody* as he exercised before.

From other findings it appears that his employment to watch and take care, &c., was to be exercised in surbordination to the actual possession of Gordon as Elgee's agent.

At page 22, folio 41, it is found that Elgee writes to Gordon plainly as the person in possession and charge of the cotton.

At page 23, the same folio, it is distinctly found that Morris objected to the removal of the bales of cotton because it had been purchased by Woodruff & Co., and because *Mr. Gordon, as agent of Elgee*, claimed to have possession of the cotton * * * It will be noticed that Morris did not pretend at this critical juncture to have himself any authority in the premises, or any possession of the cotton. Moreover, it is found (fol. 42) that Mr. Gordon *accompanied the cotton to Natchez* in the *Venango*, and called on General Tuttle and informed him that the cotton was neither confederate cotton nor abandoned cotton, but that it belonged to J. K. Elgee. It clearly appears, therefore, that Gordon not only continued in the possession of the cotton during the entire period in question as the agent of Elgee, but that immediately on the disturbance of his possession by the seizure in question, he followed the cotton and sought to reclaim it as the property of Elgee. This assertion of title on the part of the agent was immediately followed up by the assertion of title on the part of his principal.

On the 11th June, 1864 (fol. 42), Mr. Elgee brought his action of replevin against the officer in possession. He, in his lifetime, and his succession since his decease, have consistently and energetically sought to enforce their title and right in the premises.

The Court of Claims seems careful to have avoided finding, although apparently pressed to do so, any change in the custody of the cotton. On the other hand, in legal effect the court does expressly find that the possession was not changed but remained in Elgee.

At page 25 of the record, the court say (after stating as a legal conclusion, that the right of property in the cotton vested in Lobdell), "and a "right to the price of 10 cents per lb., *with a lien* "*therefor on said cotton* was vested in said Elgee "and Chambers."

Of course they could have had no lien unless they had possession. If they had abandoned their possession, of course they would have abandoned their lien which would have ceased to exist the moment their possession ceased. But if a nominal possession ever for a momenn, constructive or actual, was had by Lobdell, it was not with Elgee's consent, was abandoned by Lobdell, and the full right of ownership was resumed and assumed by Elgee.

In the case of Conway *vs.* Bush, &c., 4th Barb., Supreme Court Reports, 564, the action was trover against the defendants, who were warehousemen. The latter had received hops from King, the owner, to be sold to the plaintiffs for cash, and on the plaintiffs' failure to pay, the defendants shipped the hops to New York by the order of King. The court says: "The sale of the hops by "King to the plaintiff was treated by both "parties as a cash sale. It was not intended that "they should be delivered until payment; a pres- "ent right of property, therefore, never vested in "the plaintiff. This is a well established prin- "ciple in the law of sales (citing several author- "ities). *As between the plaintiff and King*, the title "still remained in the latter, and he had, of courser "a right to resume the possession at any time "before the sale was consumated in the former

* * *." Leven *v.* Smith & Hartshorn, 1 Denio, 571, is a case very directly in point in any aspect in which the agreement with Lobdell may be presented to the court by the defendant. The syllabus is as follows :

"Upon a sale of merchandise for cash, to be "paid on delivery, the defendant offered the "plaintiff's servant who made the delivery a note "of the plaintiff's, which had become payable, for "nearly the amount and the cash for the residue, "which the plaintiffs declining to receive, the de- "fendant refused to give up the goods or pay the "money." Held that no title passed, and that the plaintiffs could maintain replevin for the property.

The court say, among other things, "the goods "in question were sold by the plaintiffs to the "defendant for cash, to be paid on delivery ; pay- "ment and delivery were to have been simulta- "neous. No credit was given, and there is no "evidence that the delivery to the defendant was "intended to be absolute, or that the considera- "tion of payment was waived ; and the mere "handing over the goods under the expectation "of immediate payment did not constitute an ab- "solute delivery. The defendant, after such de- "livery, *held the goods in trust for the plaintiffs* "*until payment was made or waived.*" Citing numerous authorities.

4. Whatever meaning is assigned to the following words in this agreement—"From this date is "at the risk of Mr. Lobdell," it must not be inconsistent with the general intention of the parties ascertained by the application of the foregoing rules of construction. This general intent manifestly is, that neither possession nor title shall pass until after delivery, weighing and payment at Fort Adams. It is quite possible to assign an ap-

propriate meaning not at all inconsistent with this general intent. We may, without stretch of imagination, suppose one reason to have been that for political or other reasons the cotton might be regarded as more secure if nominally at the risk of Lobdell. But it is not necessary to rely upon supposition. That an agreement of this character has no necessary connection with the transfer of title or property from a vendor to a vendee is settled by very recent authority, Castle *v.* Playford, Law Reports, Exchequer, vol. 7, page 98; Martineau *v.* Kitchen, Law Rep. Queen's Bench, vol. 7, page 436. In the latter case the clause in the contract which gave rise to the action, and had to be construed, was this—"Prompt at one month, "goods at sellers' rick for two months." The court held that no title passed to the sugar, which was the subject of the contract, on the expiration of the two months, and that nevertheless the risk after that period was on the buyer. Blackburn, Judge, speaking of the risk being in one and the property in another, says: "But the two are not inseparable. "It may be very well that the prop- "erty may be in one and the risk in the other. In "the present case, I think that all that is necessary "to decide is that the risk was in the sellers. * * "If the agreement between the parties was, 'I "contract that when you pay the price I will de- "liver the goods to you but the property shall "not be yours, they shall still be my property so "that I may have dominion over them, but "though they shall not be yours I stipulate and "agree that if I keep them beyond the month the "risk shall be upon you'—and then the goods "perish. To say that the buyer could then set "up this defense and say, 'although I stipulated "that the risk should be mine, yet inasmuch as "an accident happened which has destroyed them,

" I will have no part of that risk, but will throw it " entirely upon you, because the property did not " pass to me,'—is a proposition which, stated in " that way, appear to be absolutely a *reductio ad* " *absurdum*, and that is really what the argument " amounts to."

It will not escape notice that in this case there was a very good reason for such a stipulation growing out of the ridiculously low price at which the cotton was agreed to be sold. There is nothing, therefore, in this provision of the agreement which militates against the argument that the property, possession and right of possession was in the seller at the time of the seizure. Suppose, for example, the property had been insured, which was the case in the first of the English cases last cited, would any one pretend that the insurance company could defend an action on the ground that the cotton was at the risk of Lobdell? Indeed, the fact that Elgee might possible have had a right of action against Lobdell in virtue of this particular clause in the contract does not affect the question before the court at all. A vendor in possession, with only a lien for the purchase money, is the owner of the property, in the eye of the law, for the purpose of enforcing any right of action growing out of disturbance of the possession, to the extent of the full value of that property. So that the Court of Claims having decided that such was, at least, the status of Mr. Elgee at the time of the seizure, from its own point of view, came to a manifestly erroneous judgment. In concluding this point, it is with great confidence submitted that Elgee, according to the well settled rules of law on the subject, was the owner of this cotton at the time of its seizure, according to the true construction of the terms of the agreement.

5. But if this supposed contract with Lobdell was at

any time regarded by him or his assigns as possessing any legal validity, which is more than doubtful, it was distinctly abandoned, and by a course of conduct of the most unequivocal and decisive character on the part of all parties. It was, upon its face, an entire contract for the sale of a certain lot of cotton. (Story on Sales, sec. 240 and following.) Hence but for the clause imposing the risk upon Lobdell, the mere destruction of the greater part of the subject matter would have annulled the contract, whatever meaning may be assigned to that clause.

It is not necessary, however, to dwell upon this at length. Chancellor Kent says: "Earnest is "only one mode of binding the bargain and giving "to the buyer a right to the goods upon payment, "and if he does not come in a reasonable time "after request, and pay and take the goods, the "contract is dissolved, and the vendor is at liberty "to sell the goods to another person" (2d Kent's "Com., 496).

The facts being established, the question whether a contract has been abandoned or rescinded, is one of law for the court. Thus, in Healy *vs.* Utley, 1 Cow., 345, the court say: "Whether a con- "tract of sale is rescinded or released by the acts of "the parties, is a question of law; where the evi- "dence establishing the acts and declarations from "which such an effect is claimed, is clear and un- "disputed."

In this case the court held that a contract between the plaintiff and defendant for a quantity of ores, as a legal consequence of the conduct of the parties, established by the evidence, had been abandoned and rescinded. To the same point is Conway *v.* Bush, *supra.*

In the case at bar the facts showing an abandonment are of the most decisive character.

The alleged contract with Lobdell was made on

the 31st July, 1863. *From that day to this no communication on the subject of it appears to have been had between Lobdell and the alleged vendors or their legal representatives, and no act of any kind in the premises was done or performed by Lobdell (except the alleged employment of Morris to watch the cotton to which, for the reasons before assigned, no effect is to be attributed) looking to a performance of the contract.*

Eight months and a half afterwards, namely, March 15th, 1864, a few days before the seizure, one V. Hebert, pretending to act as agent for Lobdell, assigns the contract to Woodruff & & Co. No communication of any kind appears to have been had between these pretended assignees and Elgee & Chambers, or either of them. No steps of any kind were at any time taken by them looking to the execution of the contract. As has been before stated, (and it is a fact necessary to be borne in mind,) Lobdell does not pretend to sell to these people any cotton—he does not pretend to be in possession of any cotton, but says expressly that he sells a contract FOR THE DELIVERY of 2,100 bales, and it is expressly provided in this contract that no interest in the property shall pass to the assignees until the cotton *shall have been paid for at the rate of thirty cents a pound. When the cotton is seized by the government agent neither Lobdell nor his pretended assignees assert any right to it whatever.* If they had any possession of any kind through the man Morris, they, of course, had in fact, as well as by legal imputation, actual knowledge of the state of affairs in relation to the cotton and of its seizure, they not only forbear to assert any right or title to it themselves, *but by their whole course of conduct they recognize and assent to the justice and propriety of the claim of Mr. Elgee to it.*

On the 2d day of April, 1864, seventeen

days after the pretended assignment by Lobdell to Woodruff & Co., the cotton was seized. Nevertheless, as before stated, not a movement was made by either of these persons towards the performance of the agreement with Elgee or the assertion, in any manner whatever, of any rights in the premises until some five years afterwards, when, as a mere speculation, a petition was filed in the Court of Claims, not only by Woodruff & Co., but by some half-dozen other people claiming the proceeds. A more grotesque and absurd claim, in point of law, it would be difficult to imagine or state. Mr. Elgee likewise, and quite as distinctly, treated the contract as abandoned, if indeed he ever regarded it as having any existence, for as early as October 8th, 1863, he made a sort of memorandum of a transaction in respect to the same cotton with Holmes, as the agent of Nutt.

All that has hitherto been said in regard to the Lobdell agreement applies with equal force to Lobdell and his assignees.

It is now proposed to offer some observations upon the status of these assignees, C. V. Woodruff & Co. and peculiar to them as such.

6. By the express terms of the assignment, as well as by the findings and legal conclusions of the court below, it appears that at the time of the seizure of the cotton C. V. Woodruff & Co. had no property in it.

It is unnecessary to refer again to the assignment at length. It is sufficient to say, that by its express terms the assignees took no interest in the premises, except such as Lobdell had, and none at any time, except on condition of paying thirty cents a pound for the cotton, which condition was never performed, or attempted to be performed.

Hence the Court of Claims, as a proposition of law, decided—"That the contract made March

15th, 1864, between Lobdell and C. V. Woodruff & Co., was executory only, so that the property in the cotton therein specified remained in Lobdell after said contract."

Having come to this conclusion, there would seem to have been an end to the question of the right of C. V. Woodruff & Co. to maintain their action.

But directly the court came to another and most extraordinary conclusion, namely—

"That the parties to, *and those interested* in said contract, made 15th March, 1863 (1864 it should be), between said Lobdell and C. V. Woodruff & Co., are entitled to *the specific performance of said contract.*"

An action is brought against the United States to recover the proceeds of cotton by a plaintiff who, as the court decides, had no title to it at the time of the seizure or subsequently.

The party before the court therefore as plaintiff is one who is decided to have no title, seeking to recover as owner against the defendant. Such being the state of the case and the parties, the court decrees in favor of the plaintiff a specific performance of an antecedent executory contract, between the plaintiff and a party not in court at all, and for the benefit of whom it may concern, by this process making the plaintiff owner nunc pro tunc, and giving him judgment.

Again, while there are certain rare cases in which a court of equity will, in a suit properly brought for that purpose, decree the specific performance of contracts relating to personal property, a decree for the specific performance of a contract for the sale of corn or cotton would be a decided novelty in equity jurisprudence.

Fry on Specific Performance, p. 48, sec. 12.

3 Lea. ca. in Eq.

But even assuming every necessary formal requisite, such as a proper suit, proper subject matter and parties, every one of which are absent, a plaintiff in the situation of these people would stand before the court in a very ludicrous attitude. He could not invoke one single principle of the doctrine of specific performance in their favor. Every one of them would cry out against him.

7. The assignment of Lobdell to Woodruff & Co. was made in violation of law, and for this further reason is void.

At the time of making the contract of July 31, 1863, Elgee and Chambers and Lobdell all resided within the confederate lines, and on disloyal territory. The former at Alexandria and the latter at West Baton Rouge (Record, page 24), the cotton also being within the confederate lines.

At the time of the assignment to Woodruff & Co. by Hebert, acting as Lobdell's agent, March 15, 1864, Woodruff & Co. and Hebert were residents of New Orleans, which place then was, and for some time theretofore, had been in possession of the Union forces.

At the time to wit, March 15, 1864, *both Lobdell and the cotton remained within the rebel lines exactly where they were on the* 31*st of July previous, and this appears by the express terms of the contract under which title is claimed.*

Record, p. 36., fol. 47, 15 Wal. 399.

It is therefore obvious that the court fell into the error of supposing that the actual residence of the principal within the confederate lines, and the situation of the subject matter of the sale there was of no moment, provided the principal was represented by an agent within the federal lines, and the other contracting party was within those lines. Under the maxim *Qui facit per alium facit*

per se, the court regarded the residence of the agent at New Orleans as the residence of the principal. This was an erroneous view of the matter.

Montgomery *vs.* U. S., 15 Wal., 399.

In view of the numerous decisions of this court defining the relations bet een the General Government and the rebellious States during the late civil war, and the relations of residents of the rebellious and loyal States to each other during this period, and of the acts of Congress in the premises, little needs to be said on this subject, for the point involved must be regarded as settled.

The prohibitions and disabllities imposed alike by public and by statute law in the case of this civil war, had regard to the citizens and residents of certain *States*, namely, the States that remained loyal to the General Government and the *States* that rebelled and threw off their allegiance.

As conquests were from time to time made by the Union forces of particular districts, parts of States, a limited and regulated intercourse with such districts was from time to time authorized by the President, under authority conferred by Congress. *Except to the extent that these special dispensations were granted, the original disabilities and restrictions remained during the war in full force. No one could grant them except the President, and persons who claim a right or title by virtue of these special dispensations must bring themselves within the terms of them.*

It would be absurd to argue that citizens of a rebel State, residing and owning property within the rebel lines, with or without license, might pass through the lines of one or both armies, into a loyal State or territory in the possession of the Union forces, and there trade and traffic in such

property. Waiving the question as one not necessary to consider, whether after the commencement of the war a valid contract could have been made betwen two citizenc of a loyal State in respect of property, real or personal, actually situate in a disloyal and hostile State, it would seem to be a necessary conclusion from settled general principles, that the *status* of the people of the respective States, loyal and disloyal, in respect of trade and commerce intercourse, etc., having been once established by a state of war, and the laws which it brought into operation could not be changed *by any acts of the citizens* of any State, and could only be changed or modified by lawful public authority. Such is the doctrine of all the authorities. Limited authority in the premises is confided to military officers, who have authority in proper cases to grant safe conducts and permits to pass the lines, but not to re-establish trade, etc., unless such authority is specially delegated. It has been many times decided that only the President had such authority during the late war. It follows then that neither Elgee nor Lobdell, to whom he is alleged to have sold the cotton, could have passed the military lines into New Orleans, and have become citizens of that place for the purpose of making a valid sale to a lawful resident of that place. It would be a mockery of the principles of public law governing the situation, and of the statute law applicable to this particular case to hold that a man might be a citizen of a rebel State one day for the purpose of making a purchase of cotton, and of a loyal State the next for the purpose of making a valid sale of it. It need hardly be said that the appointment of an agent at New Orleans by Lobdell was void. The following authorities

are decisive of all the questions discussed under this point.

1 Kents Com., pp. 55, 67.
Onachita Cotton, 6 Wal., 521.
Coppell *v.* Hall, 7 Wal., 542.
Grossmeyer ~~Gross Mayer~~, 9 Wal., 72.
Montgomery, 15 Wal., 409.
Cutner, 17 Wall., 576.
Lapine *v.* Ferre, 17 Wal., 602.
Mitchel *v.* U. S. Supreme Ct., U. S., Oct. 7, 1874.

IV.

As to the claim of Nutt, but little needs to be said. He informs the court in his petition that he was beggared by the war. His only remaining capital seems to have been his loyalty. On this he obtained a permit to send an agent through the lines. He invites the court to believe that in this state of affairs he obtained a valid title by purchase within the rebel lines to over a million dollars worth of cotton. If this were true he would have invested his loyalty to a good purpose, but the proposition is too plainly untrue to call for extended discussion.

All the foregoing propositions in respect to the case of Lobdell and Woodruff & Co. apply to this case.

Nutt never obtained a shadow of title to the cotton on general principles, and never for a moment imagined that he had, or sought in any way to assert it.

Beyond all this, it is a decisive answer to this claim, that the pretended contract was, according to the authorities above cited and the decision below, a contract *across the lines*, and, therefore, illegal and void.

V.

Assuming, for the sake of this point, that the Court of Claims was right in the final theory of its judgment, clearly, interest should have been allowed to the succession of Elgee from the date of the supposed sale to Lobdell.

VI.

If the findings of fact may stand as the basis of a decision as to the right of either of these parties to recover against the United States, the Court of Claims should be directed to render judgment in favor of the succession of Elgee for the full amount of the proceeds of the cotton, and the judgment appealed from reversed.

W. W. MacFarland,
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Messrs. Carlisle & McPherson,
Solicitors and of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, Appellants, *vs.* C. V. WOODRUFF and A. BOUCHARD, JULIA A. NUTT, Executrix of HALLER NUTT, MARY A. WELLS, *e al.*,	No. 142.
BESSIE ELGEE GAUSSEN, Executrix of JOHN K. ELGEE, deceased, appellant, *vs.* THE UNITED STATES,	No. 143.
C. V. WOODRUFF & COMPANY, Appellants, *vs.* THE UNITED STATES,	No. 166.
JULIA A. NUTT, Executrix of HALLER NUTT, deceased, appellant, *vs.* THE UNITED STATES,	No. 223.

ARGUMENT FOR BESSIE ELGEE GAUSSEN, EXECUTRIX OF JOHN K. ELGEE, DECEASED, APPELLANT, ON THE EFFECT OF THE NON-INTERCOURSE LAWS.

W. W. MacFarland, *Counsel for Bessie Elgee Gaussen.*

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1874.

THE UNITED STATES, Appellants,
vs.
C. V. WOODRUFF and A. BOUCHARD, JULIA A. NUTT, Executrix of HALLER NUTT, MARY A. WELLS, *et al.*, } No. 142.

BESSIE ELGEE GAUSSEN, Executrix of JOHN K. ELGEE, deceased, appellant,
vs.
THE UNITED STATES, } No. 143.

C. V. WOODRUFF & COMPANY, Appellants,
vs.
THE UNITED STATES, } No. 166.

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THE UNITED STATES, } No. 223.

ARGUMENT FOR BESSIE ELGEE GAUSSEN, EXECUTRIX OF JOHN K. ELGEE, DECEASED, APPELLANT, ON THE EFFECT OF THE NON-INTERCOURSE LAWS.

It is not denied that Elgee and Chambers at first, and afterwards, by relinquishment of Chambers, Elgee alone, owned the cotton in question, and that it was situated on his plantations in Wilkinson county, Mississippi, where it had been raised.

The different claimants contesting the title of Elgee's rep-

resentative claim by purchase from him. The object of this brief is to show that such pretended purchases, if valid in other respects, would be void by reason of having been made in violation of the non-intercourse laws.

Invalidity of the Title of Bouchard and Woodruff.

These parties do not claim by direct purchase from Elgee. They allege a sale by Elgee to one Lobdell, and that they purchased from Lobdell. This inquiry therefore naturally divides itself into two parts:

1st. Was the alleged sale to Lobdell valid? 2d. Was the sale by Lobdell to Bouchard and Woodruff valid?

1st. The sale to Lobdell was by an instrument in writing executed in Wilkinson county, Mississippi, on the 31st of July, 1873, by Lobdell in person, and on the part of the vendors by one Gordon, who is found by the court to have been their duly authorized agent. Record, pp. 22–25, 26.

The contract is as follows:

"*Mississippi, Wilkinson County.*

"We have this 31st day of July, 1863, sold unto Mr. C. S. Lobdell our crops of cotton, now lying in the county aforesaid, numbering about 2,100 bales, at the price of ten cents per pound currency; the said cotton to be delivered at the landing of Fort Adams, and to be paid for when weighed, Mr. Lobdell agreeing to furnish at his cost the bagging, rope and twine necessary to bale the cotton unginned. And we do acknowledge to have received, in order to confirm this contract, the sum of thirty dollars. This cotton will be received and shipped by the house of Da Salva & Co., New Orleans, and from this date is at the risk of Mr. Lobdell."

It will be observed that this is not a bill of sale, but an executory contract by which each party is required to do several things.

Some of the cotton was not baled, and for this Lobdell

agrees to furnish the bagging, rope and twine necessary to bale it. The cotton is then to be weighed, paid for when weighed, delivered at the landing at Fort Adams, and received and shipped by the house of Da Silva & Co., of New Orleans.

At this time the cotton was in the State of Mississippi, a State declared by the proclamation of the President to be in insurrection, (Stat. at Large, vol. 13, p. 730,) and the court has found specifically that the *situs* of the cotton was beyond the military line of occupation of the U. S. army, p. 22.

It is further found that at this time Lobdell was a citizen and resident of West Baton Rouge, in the State of Louisiana, and that Elgee and Chambers were citizens and residents of Alexandria, in that State, (p. 22.)

West Baton Rouge is a town on the right bank of the Mississippi river, directly opposite the city of Baton Rouge, and about 129 miles above New Orleans. The history of Baton Rouge in connection with the rebellion is that soon after the capture of New Orleans, in May, 1862, it was taken possession of by the United States forces under command of General Butler. On the 5th of August, 1862, it was attattacked by the Confederate forces, under General Breckinbridge, who were repulsed. Soon after the place was evacuated for the purpose of concentrating our forces at New Orleans. (*Appleton's Cyclopœdia*, 1862, p. 191.) And about the same time the Confederate forces commenced to fortify Port Hudson, some twenty miles above.

General Banks assumed command of the Department on the 16th of December, 1862, and, intending to make Port Hudson the objective point of the compaign, he sent General Grover, on the 18th of December, 1862, to take possession of Baton Rouge, and from this time it was made the base of operation for the siege which followed.

The desperate contest for the possession of the Mississippi river was terminated by the surrender of Port Hudson, on the 8th of July, 1863.

From that time, and, in fact, from the preceding month of December, until the war ended, the military occupation and control of this place was undisputed.

Congress passed a vote of thanks to General Banks and the officers and soldiers under his command for the capture of Port Hudson, declaring that they had thus removed the last obstruction to the free navigation of the Mississippi river.

Stat. at Large, Vol. XIII, p. 401.

It would seem as if one of the immediate effects of this opening of the river was that Mr. Lobdell left his home in West Baton Rouge, and, passing up by Port Hudson, penetrated into the interior of Mississippi, within the Confederate lines, where he bargained for this cotton on the 31st of July, 1863.

Alexandria is situated on the Red river, about fifty miles in a direct line from its mouth, which is about fifty miles above Baton Rouge. Its history in connection with the rebellion is that during the siege of Port Hudson General Banks organized an expedition against it, which took possession on the 9th of May, 1873, and evacuated it on the 14th and 15th of May, 1873, for the reason that it became necessary to concentrate the Union forces on Port Hudson. It was again taken possession by General Banks' forces on his Red river expedition on the 16th of March, 1864, and on the return of that expedition was abandoned on the 13th of May, 1864. (See General Banks' official reports, Rebellion Record, Vol. IX, pp. 726 *et seq.*)

From these facts it is apparent that during the time which covered the transactions in this case, Alexandria was not in the permanent military occupation of our forces. But that such possession as they may have had of that place was precarious and transitory.

Upon these facts we insist that the sale is invalid for two reasons:

1st. A contract involving commercial intercourse cannot be made between two persons situated as these were, one within the lines of permanent military occupation, and the other within the rebel territory beyond those lines.

2d. That even if both the contracting parties were included within our lines they could not make a contract of this executory character, which could only be fulfilled by further acts of commercial intercourse across the military lines; such as sending bagging, rope, and twine into the enemy's territory and receiving and shipping cotton across the military lines.

I.

Our first proposition is, that two persons living in an insurrectionary State, but on opposite sides of the military lines, cannot contract with each other. The general principle that a condition of war forbids all commercial intercourse between the citizens of the two belligerent countries has been held applicable in all its force to the late rebellion; and further that the non-intercourse act of July 13, 1861, (Stat. at Large, vol. 12, p. 256,) was merely declaratory of this principle, and did not limit or abridge it.

The Ouachita Cotton, 6 Wallace R., p. 530.
Hanger *vs.* Abbott, 6 Wallace R., p. 532.
Coppell *vs.* Hall, 7 Wallace R., p. 556.
McKee *vs.* The United States, 8 Wallace R., p. 166.
United States *vs.* Grossmayer, 9 Wallace R., p. 72.
Montgomery *vs.* The United States, 15 Wallace R., p. 395.
Cutner *vs.* The United States, 17 Wallace R. p., 576.
The United States *vs.* Lapène, 17 Wallace R., p. 601.

Some of these cases have arisen between contracting parties who resided on the one part in a State declared by the President to be in insurrection, and on the other part by a resident of a loyal State; which is not precisely this case. But,

as we will show, the prohibition applies with equal force to transactions where both the parties resided in an insurrectionary State, but on different sides of the lines of military occupation.

In the case of the "The Ouachita cotton," certain parties living in New Orleans, after its capture purchased cotton within the Confederate lines, from vendors within those lines, and the transaction was held void, as being in violation of the non-intercourse laws. Some of the purchases were made before and some after the date of the President's proclamation of April 2d, 1863, which excepted New Orleans from the designated insurrectionary territory, (Stat. at Large, Vol. 13, p. 730.) Mr. Justice Swayne, delivering the opinion of the court, based the decision entirely upon the principle of public law; that from the time any portion of the rebel territory became under the complete and permanent control of the United States forces, its citizens were subject to the same inhibitions and disabilities as to commercial intercourse with the territory declared to be in insurrection as the inhabitants of the loyal States, and he adds: "The proclamation of the 2d April, 1863, recognized but did not change the existing condition of things. It was the same afterwards as before. The effect of the proclamation was cumulative."

6th Wallace R., p. 531.

This is the rule applied to these transactions by the Treasury Department. And it will be remembered that exclusive control of all matters relating to commercial intercourse was given to this Department by the 5th section of the act of July 13th, 1861. (Stat. at Large, Vo. 112, p. 257.)

By a circular from the Treasury Department of the 3d of July, 1863, it was declared to be the purpose of the Department, "3d. To allow no intercourse at all beyond the national and within the rebel lines of military occupation; across these lines there can be no intercourse, except that of

a character exclusively military." (See the opinion of the court in Coppell *vs.* Hall, 7th Wallace R., pp. 555, 556.)

Kent says: "This strict rule has been carried so far in the British admiralty as to prohibit a remittance of supplies even to a British colony, during its temporary subjection to the enemy, and when the colony was under the necessity of supplies, and was only very partially and imperfectly supplied by the enemy." (1 Kent's Com., p. 68, citing case of the Bella Guidata in 1785, cited also in the case of The Hoop, 1 Rob. Rep., 174.)

The case of Enoch Ensley *vs.* The United States, is entirely decisive of this question. Ensley resided in Memphis, and finding there a person who had obtained the required permission to pass through the military lines and enter the Confederacy, he authorized this person to sell property which he, Ensley, owned in Mobile, and to invest the proceeds in cotton. This was done, and the cotton thus purchased having fallen into the hands of the United States officials, Ensley, brought his action to recover its proceeds. It was urged in his behalf, that Memphis and Mobile were both in disloyal Territory, *i. e.*, in States declared to be in insurrection, and, therefore, that the transaction was as valid as if the vendor and vendee had both lived in Memphis or in Mobile; but the Court of Claims decided otherwise, and declared the contract of purchase void, as a transaction between enemies. An appeal was taken to this Court, and the judgment was affirmed, as falling within the rule laid down in Montgomery's case, 15 Wallace R., p. 395. The case of Ensley, as decided in the Court of Claims, is reported in Nott & Huntington's R., vol. 6, p. 282, and as decided in this Court, in Nott & Huntington's R., vol. 9, p. 11. It has not been reported in Wallace's Reports, presumably, because no opinion was delivered.

In the case at bar, the Court of Claims applied this rule to the purchase made by Nutt, who lived at Natchez, within our lines, but in an insurrectionary State. It is inexplicable

that Lobdell, living in Baton Rouge, could make a valid purchase of this cotton, if Nutt, living in Natchez, could not do the same, for both places were equally within the complete possession of our army.

The same question arose again in The United States *vs.* Lapène, where Mr. Justice Hunt, in delivering the opinion of the Court, says, that the line across which traffic is forbidden "was that of military occupation or control by the forces of the different Governments, and not that of State lines."

17th Wallace R., p. 602.

2d. We allege that even if West Baton Rouge, where Lobdell, the vendee, resided, and Alexandria, La., where Elgee and Chambers, the vendors, resided, were both within the lines of permanent military occupation on the 31st of July, 1863, which will scarcely be claimed, this transaction would be invalid, because it was an executory contract, which required Lobdell to furnish twine, rope, and bagging at a point within the rebel lines for the purpose of preparing cotton for shipment, and which further contemplated that the cotton should be received by and shipped to a house in New Orleans. We say that such a contract would be void if it had been made by two citizens of New York with reference to property situated in the Confederacy.

It is unnecessary to consider whether a mere transfer of title to property thus situated would be invalid; for such a transaction might not involve any commercial intercourse which the public law interdicts. The point we make is, that the contract in this case could not be carried out without violating that law.

In the case of Coppell *vs.* Hall both the contracting parties resided in New Orleans, but the cotton, the subject-matter of the contract, was within the rebel lines. The agreement was that Hall should furnish the cotton, and Coppell, who was a foreign consul, should cause it to be protected and trans-

ported to New Orleans and disposed of, the proceeds to be divided in the manner specified. This court held that inasmuch as the agreement required Coppell to do that which he had no right to do, it was void. (7 Wallace, R. p. 556.) The obligations assumed by Coppell were somewhat different from those assumed by Lobdell; but they were alike in this, that in both cases the public law must be violated in their fulfillment.

The concluding clause of the contract in this case, that the property should be at the risk of Lobdell, was in effect the insurance of enemy's property; it is in legal effect almost identical with the agreement made by Coppell to *protect* the cotton of Hall; which this court said in that case was condemned by all publicists who have written on the subject.

In concluding this branch of the case we do not overlook the finding of the court that when this purchase was made, West Baton Rouge, the residence of Lobdell, and Alexandria, the residence of Elgee and Chambers, were both in disloyal territory. The issue made is not whether the territory was disloyal, but whether the places were within the lines of permanent military occupation, and as to this fact the findings of the court are silent.

II.

We allege that the pretended sale or assignment from Lobdell to Bouchard and Woodruff was also in violation of the non-intercourse laws.

It is in the following form:

"*New Orleans, March* 15, 1864.

"This contract, made this 15th day of March, 1864, between C. S. Lobdell, of the parish of West Baton Rouge, in the State of Louisiana, and C. V. Woodruff & Co., of the city of New Orleans, witnesses: That Mr. C. S. Lobdell has sold this day to C. V. Woodruff & Co., a certain contract, of which he is the owner and possessor, for the delivery of two

thousand one hundred bales of cotton sold to the said Lobdell by Elgee and Chambers, by their agent, C. W. Gordon of the county of Wilkinson, in the State of Mississippi, as will appear by reference to said contract, and the said C. V. Woodruff & Co., of New Orleans, aforesaid, hereby agree to pay to Mr. C. W. Gordon, the agent of Messrs. Elgee and Chambers, at the time of receiving said cotton, the sum of one hundred thousand dollars, or ten cents per pound currency; and in case of not being able from any cause to pay said Gordon, then said C. V. Woodruff & Co. agree to pay said sum of one hundred thousand dollars, or ten cents per pound, to Mr. Victor Hebert, of No. 47 Common street, New Orleans, for account of said Elgee and Chambers, and also to pay over to said Hebert the further sum of two hundred thousand dollars, or the sum of twenty cents per pound currency, for account of the said C. S. Lobdell; and in case the quantity of cotton should fall short, then there shall be paid ten cents per pound for account of said Elgee and Chambers, and twenty cents per pound for account of said C. S. Lobdell, for such amount or quantity of cotton as shall be required from said Elgee and Chambers; and it is understood by both of these contracting parties that this cotton belongs to Mr. Lobdell until the consideration of thirty cents per pound upon the cotton shall be paid, viz: ten cents per pound to or for account of Elgee & Chambers, and twenty cents to or for account of said Lobdell, as aforesaid.

"V. HEBERT, for C. S. LOBDELL,

"C. V. WOODRUFF & Co."

The court finds that at this time Lobdell and Bouchard and Woodruff resided in New Orleans, Lobdell having changed his residence from Baton Rouge since the previous July, when he claimed to have bought the cotton. In order to give any consideration to this branch of the case it must be assumed, for the purposes of argument, that Lobdell had made a valid contract with Gordon, the agent of Elgee &

Chambers, otherwise he had nothing to sell or assign. We must therefore assume that in July, 1863, he was resident in the rebel territory, where he made a contract for the property, and that he afterwards acquired a new status by becoming a resident of New Orleans, and then assigned his contract to Bouchard and Woodruff, of that city. With all of these assumptions we deny that this could be done.

1st. Much more than a mere change of residence is necessary to enable a person to change his status as a belligerent. Going from one place to another does not suffice, unless accompanied by facts showing the *animus manendi*.

Mitchell *vs.* The United States, (not reported.)

There is no evidence of such intention here. On the contrary the agreements described Lobdell as belonging to West Baton Rouge, and is signed on his behalf by an agent thereby indicating that he was not then in that city.

2d. It would not be lawful for a person thus to cross the military lines and acquire a new status for the purpose of disposing of rights acquired while a public enemy.

The law relating to non-intercourse cannot be evaded by such a device. If Lobdell could do this he might have contracted for all the cotton in the South while residing there, then crossed the lines, and having acquired a new residence in New Orleans or in New York, assigned his contracts to residents of those cities.

All attempts at evading the operation of this rule have been defeated and reproved by the courts.

Hanger *vs.* Abbott, 6 Wallace R., p. 535.
Wheaton on Inter. Law, 551-556.
Montgomery *vs.* The U. S., 15 Wallace R., p. 400.

3d. If such an assignment were valid, its effect would be to create a privity of contract between Bouchard and Woodruff in New Orleans, and Elgee and Chambers in the Con-

federacy, which is precisely what the non-intercourse laws forbid.

4th. If the assignor and assignees were *bona fide* residents of New Orleans, the agreement would be void, for the reason that it contemplates a violation of the non-intercourse laws in bringing the cotton from rebel territory into New Orleans.

And further, because it provides for the payment of a large sum of money to Gordon, who was unmistakably a resident of rebel territory. (See Record, pp. 21 and 22.)

This proposition has been fully discussed in another branch of the case.

5th. If Lobdell had his domicile in West Baton Rouge, as described in the assignment, he could not lawfully make any contract with a person domiciled in New Orleans. One was rebel territory, under the complete and permanent occupation of our army, the other was by the President's proclamation of April 2d, 1863, (Stat. at Large, vol. 13, p. 730,) a part of the loyal territory.

Persons situated in this belt of military occupation could not trade with citizens of the loyal States.

Cutner *vs.* The United States, 17 Wallace, R., p. 520.

III.

The title of Nutt is invalid for the reasons before stated. He was domiciled in Natchez, within our lines of military occupation, and purchased the cotton in the rebel territory, without any permit from the proper authorities.

W. W. MacFarland,
Counsel for Mrs. Elgee.



Supreme Court of the United States.

OCTOBER TERM, 1874.

BESSIE E. GAUSSEN, Ex'x, *Appellant*,
vs.
THE UNITED STATES. } No. 143.

BRIEF FOR BESSIE E. GAUSSEN, EXECUTRIX.

This case comes up by appeal from the judgment of the Court of Claims.

John K. Elgee was the owner of certain large plantations in the State of Mississippi, bordering on the river, on which, prior to the year 1863, Elgee, working the plantations with one Josiah Chambers, had raised a large crop of cotton, which had been hauled back some ten miles from the river, and stood under a shed at a place called "Felters," or "The Rocks," on the bank of Buffalo bayou. Rec. p. 22.

On the 2d day of April, 1864, a gunboat and steamer in the service of the United States visited the place and carried off 572 bales of the cotton—all they could carry. The residue was immediately burned by persons in the service of the Confederate States to prevent it from also being taken by the Union forces. Rec. p. 23.

The 572 bales were sold and the proceeds, after being for a time placed at interest, were, with the accrued interest, placed in the Treasury. Rec. p. 24.

Five several claims for the proceeds of this cotton were filed in due time in the Court of Claims:

1. That of the heirs and executors of Elgee. Rec. p. 30.
2. That of C. S. Lobdell, claiming to have been the

owner of the cotton by purchase from Elgee and Chambers, as appears from the findings.

3. That of Woodruff and Bouchard, claiming to have been the owners of the cotton by purchase from Lobdell, as appears from the findings.

4. That of Archibald Montgomery, claiming to have been the owner of the cotton by purchase from Elgee. (Record, p. 7.)

5. That of Haller Nutt's executrix, claiming that he was the owner of the cotton by purchase from Elgee. (Rec., p. 4.)

Montgomery's petition was dismissed for want of prosecution. (Record, p. 17.)

What disposition was made of the petitions of Lobdell does not appear from the record, which contains only the judgments in the cases of Bessie E. Gaussen, executrix, Woodruff & Bouchard for themselves and for the use of C. S. Lobdell, and Julia A. Nutt, executrix. These cases were, by order of the Court of Claims, consolidated. (Rec. p. 15, 16.)

The Court of Claims found that Elgee and Chambers had, by a written instrument, sold the cotton to C. S. Lobdell on the 31st July, 1863, for the price of 10 cents per pound, retaining a lien on the cotton for the price; and that Lobdell, on the 15th of March, 1864, by an executory agreement, contracted to sell the same to Woodruff & Bouchard for 30 cents per pound; 10 cents to be paid to Elgee and 20 cents to be paid to Lobdell, and that the cotton was the property of Lobdell when seized.

The Court further found that the cotton was sold for	$381,428 27
That these proceeds, being temporarily invested by agreement of parties, had made interest amounting to	91,091 68
Total	$472,519 95

	$472,519 95
That sundry expenses had been paid, amounting to	106,349 12
And thereupon had been placed in the Treasury	$366,170 83

By the judgment, the Court of Claims awarded to Elgee,s executrix, the sum of $137,882.62, being equal to 10 cents for each pound of the cotton, making $103,581.80, and the proportion of interest accrued thereon, $34,300.82.

ASSIGNMENT OF ERROR.

1. The court erred in ordering this cause to be consolidated with those of other claimants of the same property. Under this order, necessarily, the evidence already taken in each case, was used in all the cases.

2. The Court of Claims erred in not giving judgment in favor of Elgee's executrix for the whole amount of the proceeds of the cotton.

Because, according to the facts found, the cotton at the time of seizure was the property of John K. Elgee, except in so far as his title had passed to Charles S. Lobdell, by the contract between Elgee and Chambers, through their agent W. C. Gordon, and Charles S. Lobdell, on the 31st of July, 1863; and *because* the said contract did not pass the title to said cotton, but was merely an executory contract, and *because* said contract was against law and void.

3. If the court was correct in holding that the title to the cotton passed by the contract of July 31st, 1863, and that the only interest Elgee retained in the cotton after said date was the price agreed on, still the amount of the judgment was insufficient: *Because* the court did not allow interest upon the price from the time of taking of the cotton, April 2, 1864, to the date of the judgment May 8, 1872. The said interest at 6 per cent. for eight

years, one month and six days, would have amounted to $50,340.74, which added to the price would have made $153,922.53, instead of $137,882.62.

4. The court erred in deducting from the proceeds of cotton, for legal expenses, $16,000, and for Camp & Smith, $45,000, these being found to be in addition to "freights, charges, and expenses of and prior to said sales."

First Error.

The consolidation of the several claims to the fund, was an act not within the jurisdiction of the Court of Claims.

The Court was bound to hear and determine this claim as one cause, and to admit no evidence but such as was taken on notice to the claimant.

It was true that the evidence offered by Bouchard to prove his purchase from Elgee, was important to be used by the United States to defeat Elgee's claim; but the witnesses to that fact should have been examined by the United States upon notice to Elgee's executors, and their testimony was not otherwise admissible against Elgee's executrix.

Second Error.

The cotton consisted of two parcels, one of unbaled cotton about 20 bales, and the other of baled cotton abont 2,100 bales. (3d Finding, Record p. 22.

By the agreement Lobdell was to furnish the bagging, rope and twine, necessary to bale the unbaled cotton. He is not found to have ever fulfilled his agreement in this respect.

The cotton was to be delivered at the landing of Fort Adams, there to be weighed and paid for.

It never was delivered, and it is not found that Lobdell was ever ready at the landing to receive the cotton, or ever gave notice of his readiness to receive or pay for it.

The title therefore did not pass.

Montgomery *vs.* The United States, 5 N. & H., 658.
Leonard *vs.* Davis, 1 Black, 476.
Mason *vs.* Thompson, 18 Pike, 305.
Bloxam *vs.* Sanders, 4 B. & C., 941.
Benjamin *vs.* Gates, Bk. 2, chap. 3.
Hanson *vs.* Meyer, 6 East., 614.
Blackburn on Sales, p. 150.
Story on Sales, sec. 321, &c.

THIRD ERROR.

The agreement was express to pay the price upon the delivery of the cotton. The cotton, it is true, never was delivered, but Lobdell had all the benefit of the act of the United States in taking the cotton and sending it to a market. Having claimed and taken the benefit of that act, as if done by himself, he should be compelled to give his vendor the benefit of it also. Sedgewick, Meas. Dam., 374.

FOURTH ERROR.

The act of Congress of March 12, 1863, (Sec. 3, 12 Stat., 820,) authorizes the deduction from the proceeds of—

1. Purchase money.
2. Expenses of transportation.
3. Expenses of sale.
4. Lawful expenses attending the disposition of the cotton.

The expenses enumerated by the court as freight charges and expense of and prior to the sale of the cotton, include all the expenses authorized by law. "Legal expenses" and payments "on account of contract by the United States with him, [Camp,] for collecting said 572 bales for an interest thereon," being expressly stated to be in addi-

tion to freight charges and expenses of and prior to the sales," and therefore not being such expenses, but different expenses, are not within the statute.

Conclusion.

We submit:

1. That the judgment should be reversed, and the case remanded with directions to render judgment for the claimant for the full amount of the fund.

2. Or that the judgment be reversed and a new trial ordered.

CARLISLE & McPHERSON,
For Appellant.

W. W. MacFarland,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, 1874.

BESSIE E. GAUSSEN, EXECUTRIX, *Appellant*,
vs.
THE UNITED STATES. } No. 143.

John D. McPherson, being duly sworn, deposes and says:

The above entitled action was commenced in the United States Court of Claims on the 30th day of March, A. D. 1868, (Record, p. 30,) to recover the proceeds of five hundred and seventy-two bales of cotton, the property of John Elgee in his lifetime, and taken from his possession by the United States, and sold under the provisions of the act known as the captured and abandoned property act.

In the paper book containing the record in the above entitled cause is also printed the record in a certain cause of—

C. V. WOODRUFF and A. BOUCHARD
vs.
THE UNITED STATES. } No. 166.

And of—

JULIA A. NUTT, EXECUTRIX,
vs.
THE UNITED STATES. } No. 223.

The plaintiffs in each of the last above entitled causes, as appears by the petitions, claim title to the proceeds

of said cotton against the United States, the former, under and through the said Elgee and one Josiah Chambers, and the latter under the said Elgee alone, under and by virtue of pretended contracts of sale made in the lifetime of the said Elgee; the said Woodruff and Bouchard claiming under a pretended contract made by W. C. Gordon, as agent of the said Elgee and Chambers, to one Chas. S. Lobdell, and a pretended asssignment of the said contract by the said Lobdell to them, the said Woodruff & Bouchard, and the said Nutt, executrix, claiming under a pretended contract made subsequently, as is claimed, between the said Elgee in his lifetime, and the husband of the said executrix in his lifetime.

Elgee's executrix denies the right of both of said adverse claimants, and insists upon her right to the entire fund.

The United States deny the rights of all the respective claimants in the premises, and claim title to the proceeds of the said cotton.

The cotton was seized by the United States in the month of April, 1874.

At the trial of these causes in the Court of Claims, evidence was offered to prove that prior to the breaking out of the late rebellion, the said Elgee had purchased three cotton plantations from one D. D. Withers, and the same had been conveyed to him, and he had paid part of the consideration, and given his notes for the balance; that subsequently the said Elgee and Josiah Chambers had made some agreement in writing by which the said Chambers was, on some terms not now known, to acquire an interest in the plantations, and they were for a short time worked under this arrangement in the names of Elgee and Chambers, but soon after the war commenced, Chambers, foreseeing the ruin of the planting interst, desired to withdraw from the arrangement, and as he and Elgee were connected by the marriage of their children, and Elgee's

refusal to release him would have led to a rupture between the families, Elgee yielded to his wishes and cancelled and destroyed the writings which had never been recorded, and the whole interest in the land and crops was thus transferred to or suffered to remain in Elgee. This was a considerable time before the seizure of the cotton by the United States.

These facts were proved by the deposition of Josiah Chambers and that of William Urquhart, (who had been the factor of Elgee and Chambers,) taken on due notice to the United States, for the purpose of proving that the said Chambers had no interest in the said cotton at the time of the decease of the said Elgee, or at the time of the capture of the cotton, and in order to rebut any evidence arising from the style under which they had conducted business, and from the fact that the said cotton was referred to in various papers in the cause as having been the cotton of Elgee and Chambers. On the taking of such testimony the United States were duly represented by their attorney. A copy of the depositions of the said Chambers and Urquhart is hereunto annexed and marked Exhibit A.

On this testimony, and on other testimony in the cause, the Court of Claims found and recited in its judgment that the said Chambers had no interest in the said cotton at the time of the decease of the said Elgee or at the time of its seizure; and that whatever interest he might at any time theretofore have had, was vested in the said Elgee at the time of his decease, and became vested in the plaintiff as executrix. But the court omitted to state the facts aforesaid as independent substantive facts in their findings of fact, as deponent is advised the rules of this court require.

Deponent further says that the firm of Carlisle & McPherson represent, and have, since the year 1870, represented, as solicitors and counsel, the succession of Elgee,

through the retainer of Mr. D. D. Withers, of the city of New York, who, as deponent is informed, is the sole creditor o the succession and for an amount exceeding the amount in controversy, and who held, and holds, a power of attorney from the said executrix to prosecute this claim. And as such creditor, the said Withers has hitherto, at his own cost and expense, and still does prosecute the said claim against the United States, in the name of the said executrix, as this deponent is informed and believes.

Deponent further says, that Mr. Carlisle has been, since their first retainer, the senior counsel in the said cause, and as such has had the general charge and direction thereof on the part of the plaintiff. That during the entire October Term, 1873, he was in ill health, and suffered under an infirmity of sight of long standing, on which account he was advised to go, and did go, in June, 1874, to Europe for his health, where he has since remained.

Deponent believes that for the reasons aforesaid Mr. Carlisle's attention was never drawn to the irregularity aforesaid, and deponent's own attention was not called to the peculiarity of the finding of fact as to the interest of the said Chambers in the premises, until about the time when the said cause would have been reached in its order for argument, when Mr. MacFarland, having been retained to argue the cause in place of Mr. Carlisle, pointed out the condition of the record in this respect to deponent, and expressed some fear that the finding might not be regarded as within the rule. Therefore, this deponent at once took measures lookingto the remedy of this technical difficulty.

Deponent has since observed, on examination of the brief filed on behalf of the United States, that the non-compliance with the rule of this court touching the point in question, is relied upon to defeat the plaintiff's claim, but this objection of the Attorney General was not known to

this deponent, and he confidently believes not to Mr. MacFarland, until after the defect was discovered by the latter, and means determined on to correct it.

JNO. D. McPHERSON.

Sworn and subscribed before me, this 13th day of February, 1875.

W. D. MIDDLETON,
Clk., S. C., U. S.

Supreme Court of the United States.

No. 142.

UNITED STATES, APPELLANTS,

vs.

C. V. WOODRUFF *et als.*

Nos. 143, 166, 223, *Cross Appeals.*

ON MOTION OF APPELLANTS IN CROSS-APPEAL 143 TO REMAND THE CASE TO THE COURT OF CLAIMS TO HAVE A NEW FINDING OF CERTAIN FACTS.

Brief on the part of C. V. Woodruff et als., Appellees, and Appellants in No. 166, *opposing the Motion.*

BENJ. F. BUTLER,
Of Counsel for C. V. Woodruff & Co.

Judd & Detweiler, Printers.

Supreme Court of the United States.

No. 142.

UNITED STATES, APPELLANTS,

vs.

C. V. WOODRUFF *et als.*

Nos. 143, 166, 223, *Cross Appeals.*

ON MOTION OF APPELLANTS IN CROSS-APPEAL 143 TO REMAND THE CASE TO THE COURT OF CLAIMS TO HAVE A NEW FINDING OF CERTAIN FACTS.

Brief on the part of C. V. Woodruff et als., Appellees, and Appellants in No. 166, *opposing the Motion.*

The respondents oppose the appeal—

First. Because the party making it has no legal standing in court.

Second. Because if in position to make the motion, the application should not be granted because of laches of the appellant moving the same.

Third. Because the fact sought to have been found by the Court of Claims is not proven by any evidence proper to have been considered at the time of the hearing on the merits of the case in the court below.

Statement of Facts.

John K. Elgee and Josiah Chambers were, on and before the 31st day of July, 1863, the owners of certain plantations situate in Wilkinson county, Mississippi, known as *Artonish, Lock-Leven, and Lochdale*, on which the cotton the proceeds whereof are claimed in these several suits was raised. At that time the cotton was stored at a place known as the "Rocks," in Mississippi, without the Federal military lines. (See Record, pp. 21, 22.)

All the petitioners in these several suits claim through *mesne* conveyances of Elgee and Chambers, through sales of the same agent, except Bessie Elgee Gaussen, who claims, as the executrix of John K. Elgee deceased, who is now attempted to be supplanted in her office as executrix by one Parker, public administrator, appointed by the courts in Louisiana as successor of said Gaussen, who was appointed in the parish of Orleans, and one Wells, who was appointed, subsequently, as administrator of the same decedent in the parish of Rapides, Louisiana.

The order of filing of the several claims to the *res* was as follows:

Woodruff *et al.*, January 13, 1868, (Record, p. 1.)

Julia A. Nutt, executrix of Haller Nutt, August 19, 1868. (Record, p. 4.)

Mary Ann Wells and others, descendants and heirs-at-law of Elgee, among whom appears Bessie Elgee Gaussen, in her own right, as heir and as natural tutrix of her minor children, appears as petitioner, but claiming the *res* in no other right whatever. (Record, pp. 30–31.)

These are all the petitions now appearing on the record filed within the statute of limitation, to wit: prior to August 20, 1868.

After the 8th day of December, 1871, D. D. Withers, attorney-in-fact for Bessie Elgee Gaussen, "moved to amend said petition of Mary Ann Wells *et al.*, by declaring that

Gaussen is dative and testamentary executrix of the last will and testament of John K. Elgee, deceased," (Record p. 12,) which amendment nowhere, by the Record, appears to have been made or granted by order of the court, nor does there appear in the record any evidence of her authority as such executrix.

It appears that John K. Elgee, the decedent, died on the 14th day of October, 1864. (Record, p. 10.)

These causes coming on to be heard, on the motion of the United States, on the 21st of January, 1869, it was ordered that interpleaders be filed therein within thirty days from the date (Report, p. 15); whereupon amended petitions in the form of petitions of interpleader were filed by the several parties now on the record. Whereupon it was ordered that certain of the causes be consolidated, to wit: Woodruff *et al.* against the United States, and the same for the use of C. S. Lobdell against the United States, the petition of Lobdell being numbered 3,203 on the docket of the Court of Claims, (Record, p. 15 *et seq*,) and Bessie Elgee Gaussen, executrix of John K. Elgee, Mary Ann Wells *et al.*, children of John K. Elgee, which consolidated causes came on to be heard, (Record, p. 18,) and they were heard on the 5th of March, 1872. (See certificate of the clerk of the Court of Claims, filed with this brief; also Record, p. 18.)

Upon this state of facts and pleadings judgment was rendered in favor of Woodruff & Company as owners in their own right and assignors of Charles S. Lobdell for the *res* as against the United States, and certain vendors' and creditors' liens upon the same were decreed to be paid out of the fund to Bessie Elgee Gaussen and the said Lobdell, and the case of Haller Nutt and of Mary Ann Wells were ordered to be dismissed, except so far as the same is the petition of Bessie Elgee Gaussen, executrix. This judgment was entered May 8, 1872. This proceeding of dividing the fund was by consent of the parties in interest. (Record, pp. 18 and 19.

Cross appeals from said judgment were filed by the United

States and Gaussen, April 9, 1873; by Woodruff & Co., July 11, 1873, and by Nutt, executrix, October 11, 1873.

Upon the facts and pleadings as they thus appear on the record, respondent claims that Bessie Elgee Gaussen, or the administrative representative of John K. Elgee, had no standing as a petitioner under the captured and abandoned property acts in the Court of Claims or in this Court. First, because, under the act of March 12, 1863, known as the captured and abandoned property act, no person—not being the owner of the property and thus entitled to the proceeds, or his legal representative—can file a petition in the Court of Claims therefor, and that that court has no jurisdiction of any claim by any owner of property unless filed within the time limited. This has repeatedly passed under adjudication.

Carroll *vs.* United States, 13 Wall., 151.

Now the heirs of one deceased, as such, or the guardian of the heirs as such, cannot maintain a suit at law for the estate or any part thereof of the decedent, nor can they allege themselves to be the owners in any sense of that estate, or of any right or of any *chose in action* belonging to that estate, which was the condition of this claim on August 20th, 1868, the date of the expiration of the limitation. And the record shows that the administratrix or executrix had not filed any petition whatever before that day.

We deny that it is competent for the Court of Claims to allow an amendment to a petition which shall introduce a new party as petitioner on the strength of whose title as owner of the proceeds of abandoned property, the case alone can be supported after the time limited by law for the filing of any petition. The petition of the heirs of Elgee, as such, was a mere nullity. It could not be sustained, and was not sustained, by the Court of Claims.

(Record, p. 19)

Whatever may be the power of a court of equity in some

special cases to permit an heir to prosecute for any part of the personalty, such proceeding is not within the competency of the Court of Claims, which is a court of law.

This point has never passed under decision of this court, but has been considered in the Court of Claims, (5 Court of Claims' Reports, p. 196, Cowan *vs.* The United States.) In this case the petition was filed in the name of infant heirs, under the peculiar provisions of the code of Mississippi, and after demurrer on the part of the United States the administrator was allowed to come in by filing an amended petition containing allegations that no other party was interested in the estate except the original petitioners as heirs, and the court say that if any other party had any interest in the *res* such an amendment would not be admissible, because it would introduce a new party as owner in contravention of the statute, and therefore the court required the administrator to allege and prove that there were no other parties in interest save the heirs of the original petitioners.

This decision will not support the case at bar, especially as in the affidavit on which this motion is now being based it is expressly sworn that said Withers, who is prosecuting this cause in his own interest, is a creditor of the estate of Elgee to a much larger amount than the whole value of the estate, including the matter here in controversy, so that a new owner and new party in interest is introduced by way of amendment after the statute of limitation has expired.

Statutes of Limitation as Affecting the Power and Right of Amendments.

In a suit in equity, brought against directors to enforce a personal liability for corporate debts, under Revised Statutes, chap. 38, section 25, "the plaintiff will not be allowed to amend his bill after a demurrer to it has been sustained, and after his demand is barred by the statute of limitations.

Merchants' Bank *vs.* Stevenson, 7 Allen, p. 489, (1863.)

New parties plaintiff cannot be substituted in a *scire facias*, by amendment where the necessity for different parties arose before suit was commenced; so held where the statute of limitation had run.

Willink & Willink *vs* Renwick & Renwick, 22 Wendell, N. Y., p. 608.

In ejectment it is generally allowed, of course, to amend by inserting a new demise where the proposed lessor has a subsisting title; otherwise when the statutes of limitation have attached.

Jackson *vs.* Murray; 1st Cowan, 156.

Where a suit is commenced before the statute time has elapsed, and after it has elapsed, third persons are brought in as defendants by amendment of the bill, the statute of limitations will avail the new defendants at the period when the amended bill was filed; and they are not to be affected by the proceeding during the time they were strangers to it.

Supreme Court, 1832, affirming S. & C.; 1st McLean, p. 85, 1814.

Alexander *vs.* Pendleton, 8 Cranch, 462, S. P., the case of amendment by adding a demise in the name of another party asserting a different title. 1832; Sicard *vs.* Davis, 6 Peters, 124.

It would be a novel and unjust principle to make the amended bill relate back to the commencement of the suit, and thus render the defendants responsible for a proceeding of which they had no notice, and where a final decree in the case could not have prejudiced their rights. S. C. 1832, Miller *vs.* McIntyre, 6th Peters, 61.

In the case of Bonner *vs.* the United States, (9th Wallace, page 156,) a statement of the court is made use of by Judge Casey to establish the position that the Court of Claims have no chancery or equitable powers; the case, we think, establishes a different conclusion.

But there is nothing in the record which shows that the court below allowed this amendment. (Record, p. 12.) On the contrary, after ordering the consolidation of the causes on hearing, the court dismiss the petition of Mary Ann Wells *et al.*, except so far as they sustain it under the order for interpleader, to award a portion of the fund which the court had adjudged to Woodruff and Bouchard to the estate of Elgee in payment of his vendor's lien (Record, p. 19.) This use of the petition under the order of interpleader is unobjectionable, legitimate and proper, and was, by consent of the parties in interest.

Second. If the representatives of John K. Elgee have any standing as a party properly in court to make this application they are not entitled to make it because of their laches. The record shows that the judgment was entered in the court below on the 8th day of May, 1872, (Record, p. 19;) that the appeal was taken on August 6, 1872. (Record, p. 20.)

On the 24th of April, 1872, these defendants ask further findings of fact, which were refused, (Record, pp. 28, 29,) and on the 3d of November, 1873, they obtain a writ of *certiorari* from this court, to bring up what they allege to be by a diminution of the record and the proceedings in said cause in the court below. (Record, p. 30.)

Under these circumstances can they be permitted to lie by nearly three years, having delayed the filing of their appeal for nearly one year, to wit: to the 9th day of April, 1873, and then, when the case is on the eve of argument, have it remanded for a new finding of any fact, and *à fortiori* one, within their own knowledge, to wit: the state of their own title and the claim of their own parties; the case finding

that Elgee and Chambers were in partnership? (Record, p. 24.)

This motion, if granted, might work another delay of at least three years; and will the court, moved only because the explanation and reason shown by the affidavit, allow parties upon such a point to sleep upon their rights to the manifest injury of the rights and interests of all the other parties.

Third. The fact which is asked to be found was not proven before the Court of Claims by any evidence proper to be considered at the time of the hearing on the merits of the case in the court below.

It is alleged that the fact sought to be found appears by a deposition of Josiah Chambers, filed in the case, (Record, p. 18,) and yet the fact is not found in the findings of fact by the court.

What is the explanation of this? It will be found in the following words: (Record, p. 18.) "And it appearing by the deposition of Josiah Chambers, taken and filed in the case and admitted *ex parte* on behalf of the representative of said Elgee, that he the said Chambers, before the seizure of said 572 bales of cotton, had withdrawn from the co-partnership of said Elgee, and at the time of said seizure had no interest in said cotton."

This fact was admitted by consent when the question was considered by the court, in whose favor the judgment on a vender's lien should be had upon *ex parte* admission in the case of evidence which was not used on the hearing between the parties because it was obtained and filed too late, *i. e.* after the cause was set down for argument.

The record shows that the cases were set down to be heard and the argument thereon commenced, the testimony being closed on the 16th of January, 1872, and then, upon the motion of Woodruff and Bouchard, the hearing was postponed until the 5th day of the following March, with leave

to either party then to introduce evidence in open court in regard to the execution of a contract. (Record, p. 18.) So that no evidence was to be admitted upon any other point after the 16th of January, 1872, except as to the execution of a certain contract, and that to be heard in open court.

Now, the official copy of the record of the Court of Claims, filed herewith, shows that the deposition of Josiah Chambers and others in the case of Wells and others against the United States was not filed until the 28th of February, 1872, or more than six weeks after the argument of the cause commenced.

[Objection. Depositions not taken till February 23, 1872.]

I am also informed (not being present at the trial) that the depositions of Chambers and others were taken without notice to the United States, and were objected to by the Government for that reason. That may account for the phrase in the judgment of the court admitted *ex parte* on the part of Elgee.

This is the explanation why the court below did not find as a matter of fact, in the findings of fact, what was Chamber's interest in the *res*, if any; and it also explains why, in the part of its judgment dividing the funds, the court declare that evidence was "admitted *ex parte* on the part of Elgee;" that is, to determine Elgee's rights between his estate and his partner.

To send this case back now for such finding of fact would be, after three years delay, to direct the court to find a fact to the injury of the other parties in interest and the United States, upon evidence which was not before them at the time of the hearing and adjudication of the case.

Again, this fact is not a mere technical one, because the record shows that Gordon, who made the contract of sale to Lobdell and Woodruff & Co., was authorized by Elgee and Chambers, and acted for Elgee and Chambers, and if Chambers can now be eliminated from the case by a new finding

of fact, it may and perhaps will be the foundation of a claim that the agency of Gordon is not duly sustained; for if Elgee and Chambers had a partnership or joint interest in the cotton, Gordon might as well have been authorized by Chambers as by Elgee to dispose of partnership property.

Lastly. If the case is to be sent back it is respectfully submitted that it should be sent with leave to all parties to move for new findings of fact in their behalf, as the court has already denied our petition for a *certiorari* to have new facts sent up.

BENJ. F. BUTLER,
Of Counsel for C. V. Woodruff & Co.

Supreme Court of the United States.

THE UNITED STATES

vs.

C. V. WOODRUFF, A. BOUCHARD, *et al.*

BRIEF FOR C. V. WOODRUFF & CO.

B. F. Butler,
John A. Grow,
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THE UNITED STATES

vs.

C. V. WOODRUFF, A. BOUCHARD, *et al.*

BRIEF FOR C. V. WOODRUFF & CO.

Statement of the Case.

On the 31st day of July, 1863, Elgee & Chambers sold to Charles S. Lobdell their crop of cotton, consisting of twenty-one hundred bales, lying in Wilkinson county, State of Mississippi, near the point known as Fort Adams. (Rec., pp. 22, 25, 26.) At the time of the sale the cotton was stored under a shed at the point on Buffalo Bayou called the Rocks.

Record, p. 22.

The sum of thirty dollars was paid on this cotton at the time of the execution of the bill of sale, in order to confirm the sale, but it was *stipulated that the cotton was to be from that date at the risk of Lobdell.* (Record, p. 26.) Immediately after the sale of the cotton to him he employed a man by the name of J. M. Morris to take charge of the cotton, and paid him for saic service.

Rec., p. 22.

In case of the loss or destruction of this cotton in consequence of the assumption of its risk by Lobdell, it was estimated that it weighed five hundred pounds per bale.

Rec., p. 26.

This cotton remained up to the time of the seizure of five hundred and seventy-two bales at the place where it was when sold to Lobdell.

Rec., p. 23.

On the 2d day of April, 1864, five hundred and seventy-two bales of this cotton was taken by the United States, and the proceeds ultimately turned into the Treasury.

Rec., pp. 23, 24, 25.

At the time of the sale of the cotton to Lobdell, the agent, W. C. Gordon, through whom it was made, was authorized by Elgee & Chambers, in their behalf, to make such sale.

Rec., p. 22.

And at that time the places where the parties resided were in enemy's territory, as well as the place where the cotton was stored.

Rec., pp. 22, 24.

Vicksburg surrendered on the 4th of July and Port Hudson on the 8th of July, 1863. The Mississippi river was declared open to commerce and navigation in the fall of 1863.

This cotton could not have been moved before its seizure without a violation of the non-intercourse act, or subjecting it to the imminent peril of destruction.

Rec., p. 24.

As soon as commercial intercourse on the Mississippi was declared to be open Lobdell went to New Orleans to reside. (Rec., p. 23.)

On the 15th day of March, 1864, Lobdell contracted to sell this cotton to C. V. Woodruff & Co., cotton factors, doing business at the city of New Orleans.

Woodruff *et al. vs.* U. S., 7 Ct. of Claims, 624.

This contract conveyed no title to Woodruff & Co., but to cure this defect, and to authorize them to institute a suit in the Court of Claims, after the taking of the five hundred and seventy-two bales by the United States on the 3d day of May, 1864, Lobdell made the assignments to be found on Rec., p. 26.

By reason of these assignments Woodruff & Co. were authorized to institute proceedings in behalf of Lobdell, (Rec., p. 24,) and accordingly they instituted their suit in the Court of Claims.

The Elgee Claim.

After the seizure of the five hundred and seventy-two bales by the United States, John K. Elgee followed them to St. Louis and attempted to replevin them from the agent of the Treasury Department, who had them in charge, but the suit which he there instituted was decided against him by Mr. Justice Miller, and which decision, on appeal to the United States Supreme Court, was affirmed.

Rec., p. 24.

While the cotton in question was the subject of litigation a stipulation was entered into between the Secretary of the Treasury and the parties litigant that the cotton should be sold and the proceeds invested for the interest of the owner thereof in the bonds of the United States to await the result of the said suit.

Rec., p. 24.

On the affirmance of the judgment, as above stated, the bonds were sold and the proceeds thereof, principal and interest, were turned into the Treasury of the United States.

Rec., p. 24.

Soon after the commencement of the replevin suit in St. Louis, John K. Elgee died, and during the year 1868, and

before the 20th of August of that year, persons representing themselves to be the heirs-at-law of John K. Elgee, Mary Ann Wells, wife of James Madison Wells, Clara M. Smith, Louisiana I. Isaacs, Catharine M. Jones, Bessie Elgee Gaussen, both in her own right and as natural tutrix and as natural guardian of her children, and Mary Eliza Fauntleroy, filed their petition in the Court of Claims, setting forth the ownership of their ancestor of the cotton in question and their right to recover as such heirs the proceeds thereof. It was alleged by them that the sale made by their ancestor to Charles S. Lobdell was only executory, and never passed the title of the property.

The Nutt Claim.

In 1863, Truman Holmes, as the agent of Dr. Haller Nutt, contracted with John K. Elgee for the purchase of so much of the twenty-one hundred bales of cotton which was stored on the Feltus plantation as he should get out in safety to a market for the price of fifteen pounds per bale, to be paid at Liverpool. The copy of that agreement will be found 7th Court of Claims Reports, p. 621.

Nutt never had possession of this cotton, nor did he ever get out a bale. In order to make this purchase, Mr. Holmes, at the instigation of Nutt, got a permit from the military authorities at Natchez to pass from within the Federal lines to those of the enemy in order to consummate this purchase. On the 19th of August, 1868, Julia A. Nutt, as the executrix of Haller Nutt, filed her suit in the Court of Claims for the recovery of the proceeds of the 572 bales in question.

The foregoing constitutes the grounds upon which are based the claims of the respective claimants.

The Lobdell and Woodruff & Co. Claim.

1. The bill of sale to Lobdell vested the title of the cotton in him.

Rec., p. 25.
Benj. on Sales, pp. 233, 234, 238, 239, 240, 241, 242.
Crofoot *vs.* Bennett, 2 Comstock N. Y. Rep., 258.
Blackburn on Sales, 152.
Turley *vs.* Bates, 2 Hurlstone & Coltman.
Woodruff *vs.* The U. S., 7 Court of Claims, 620.

2. The assignment of the bill of sale and claim against the Government for the proceeds of the cotton by Lobdell to Woodruff & Co., authorized and empowered them to institute proceedings in the Court of Claims.

Rec., 24.
Lawrence and Crowell's Case, 8 Court of Claims Report, 252.
15th Stat. at Large, 75, sec. 4.
12th Stat. at Large, 767, sec. 12.
United States *vs.* Burns, 12th Wallace, 246.

It will be observed that the sections of the Statutes at Large referred to distinctly recognize the right to prosecute assigned claims in the Court of Claims.

The Floyd Acceptance Cases, 7 Wall., 66.

3. The contract for sale of the cotton by Lobdell to Woodruff & Co. was made in the city of New Orleans, in the State of Louisiana, and is therefore governed by the civil law, and by the law of that State, Civil Code, arts. 1920, 2433, they were entitled to a specific performance of the contract.

4. After the purchase of the cotton by Lobdell he was not bound to move or pay for the same until he could lawfully do so. The cotton at no time after such purchase could

have been moved without danger of destruction or forfeiture for a violation of the non-intercourse act.

Rec., p. 24.

The Court will judicially take notice of the proclamations of General Grant and General Banks, issued in September or October, 1863, occurring a month or two months after the purchase of this cotton by Lobdell, declaring the Mississippi River open to commerce and navigation, and that by this means the Parish of West Baton Rouge was practically brought within the Federal lines, and that any attempt by Mr. Lobdell to remove and pay for the said cotton without a Treasury permit would have subjected it to forfeiture. The Court will take judicial notice also of the fact that it was not until the spring of 1864 that such permits were granted; no laches can be imputed to any of the parties until they could lawfully fulfil the terms of the purchase.

5. The United States admit the sale and transfer of title by Elgee and Chambers to Lobdell under the bill of sale executed by W. C. Gordon, on the 31st of July, 1863.

Attorney General's brief, p. 8, at foot of page, and p. 9.

6. JUDGE CASEY'S BRIEF.

The first point stated in the argument of that brief is not a point arising in this case, nor do the authorities cited in it apply or in any manner relate to it, except a few of them, which establish the principle contrary to his own declaration.

Record, p. 25.

7. The second point of the same brief, which reads as follows: "The contract was in violation of the non-inter-"course acts, because it provided for consummation by the "delivery of the cotton at Fort Adams, within the Union

"lines, although the parties to the contract and the cotton "were within the rebel lines at its date," is not a point that is well taken, for it is expressly provided by statute, and regulations were adopted by the Treasury Department in furtherance of such purpose, authorizing residents and owners of cotton within the Confederate lines to bring it out and dispose of it to the United States.

Maddox's Case, 15 Wall, 58.
U. S. *vs.* Lane, 8 Wall, 185.
13th Stat. at Large, 731.

It will not be presumed that either of the parties to that sale contemplated a violation of the non-intercourse act, but on the contrary, it must be presumed to have contemplated the removal to be made in conformity to law and the regulations of the Treasury Department. The purchase of the cotton by Lobdell from Elgee and Chambers was a lawful transaction. (See Judge Casey's Brief, p. 13, at the top.)

Anderson's Case, 9 Wall. R., 56.

8th. It is true, as stated in the same brief, that Woodruff & Co. get no different title than that held by Lobdell; but this question is not involved in this case, and none of the authorities cited to sustain it except the one Shuff vs. Morgan, 9 Martin, 592; and that is a case in favor of Woodruff & Co.

9th. The fourth proposition of the same brief, that the contract between Woodward and Bouchard and Lobdell, was in violation of the non-intercourse acts, because at the time it was entered into Woodruff and Bouchard were residents within the Union lines, and Lobdell was within the rebel lines, is contrary to the finding of the Court of Claims. Both of the contracting parties resided in the city of New Orleans.

Record, p. 23.

10th. The fifth and sixth propositions of the same brief is contrary to the findings of the court, so far as it applies to the purchase and residence of Nutt.

Record, p. 22.

11th. The seventh point of that brief, that "at the time "these cases were tried and judgments rendered therein Lob- "dell was not a party to the record in any case before the "court, and the Court of Claims had not therefore jurisdic- "tion of his claim, nor any power to render any judgment "in his favor," is contrary to the finding of the court.

Record, p. 24.

Lobdell was present in court through Woodruff & Co., and judgment was rendered in his favor by their consent.

Record, p. 24.

Also, Woodruff's case, 7 Court of Claims, p. 625; (see assignment of contract of sale.)

As to Lobdell's suit, which was pending in the Court of Claims at the time the suits of the several claimants were ordered to be heard together, (Rec., p. 15,) it was consolidated with the suit of C. V. Woodruff & Co., prosecuted in his behalf, and heard as one suit. (Rec., pp. 18, 19.) Finding of fact (Rec., p. 24) and conclusions of law, (Rec., p. 25.) Lobdell came into court in the Court of Claims in proper time, and seems to have acted in conjunction with Woodruff & Co., and was really a party to the proceedings on the hearing and at the time of the judgment; hence the court found as it did.

12th. The eighth proposition of the same brief is wholly untenable.

See authorities cited in the 2d division of this brief.

13th. The ninth proposition that "the Court of Claims "had no jurisdiction to require the several parties asserting

"conflicting claims to the proceeds of this cotton to inter-"plead with the other, or to direct and require that all of "the conflicting claims to the proceeds of this cotton should "be heard and determined as a single suit," is hardly a correct statement of the fact. The Court of Claims decided that they should be heard together. The counsel who asserts this proposition was the Chief Justice of the Court of Claims when this order was made, and was present and acquiesced in the opinion of the court read by Mr. Justice Nott at the time.

Woodruff's case, 4th Court Claims, p. 487.

The Court of Claims has all the power necessary to enable it to dispose of the business that may be before it.

See Revised Statutes of U. S.

"The said court shall have power to establish rules for "its government, and for the regulation of practice therein, "and it may punish for contempt in the manner prescribed "by the common law, and may exercise such powers as are "necessary to carry into effect the powers granted to it by "law."

In general. The Court of Claims applies to cases before it the principles of law and equity.

Todd *vs.* U. S., Dev. R., 83–175.

The Court of Claims cannot make others, not represented, parties to proceedings before it. (Hale *vs.* U. S., Dev., 137.) But when they come voluntarily within its jurisdiction, it certainly can pass upon their rights.

The Court of Claims in deciding upon the rights of claimants is not bound by any special rule of pleading.

U. S. *vs.* Burns, 12 Wall., 246.

It may be true that the Court ot Claims cannot entertain a suit in equity against the United States, as the learned counsel infers from the case of Bonner *vs.* The United

States, (9 Wall., 156,) for the reason that Congress did not enumerate this when it created the Court and conferred jurisdiction upon it, but it does not follow that it cannot exercise equitable powers over such jurisdiction as is conferred upon it by law. It is a court for the adjustment of claims, however difficult or complicated they may be, and when it once has obtained lawful jurisdiction of a subject-matter it evidently was intended that it should have all the necessary power to decide upon and dispose of the matter in dispute.

As an evidence of this fact the testimony is to be taken in writing, and appeals, instead of writs of error, are allowed from the judgments of the court, subject to such rules as may be adopted by the Supreme Court. The chancery powers of this court over those cases which it has jurisdiction is recognized in section 1090, Revised Statutes of the United States, which reads as follows:

"When judgment is rendered against a claimant the "court may grant a new trial for any reason which, by the "rules of common law or chancery in suits between indi- "viduals, would furnish sufficient grounds for granting a "new trial."

Deeson *vs.* U. S., 6 Court Claims, p. 228.

If on account of a second or third claimant in any suit against the United States filing a claim in the Court of Claims, for the recovery of the proceeds of any property, the court is divested of its jurisdiction to finally determine who is the rightful claimant, then the right to bring a suit in the Court of Claims is but a promise made to the ear to be broken to the hope. Let this point be settled in the manner claimed by the learned counsel in his brief, no claimant would be able to secure a judgment before the court until he had appeased all those who are hungering for a division of what it is expected that the rightful claimant will recover. It will open the door for innumerable claimants for the recovery of the same thing, and if the court had

no power to determine who is the proper one, and all parties are to be remitted to some other jurisdiction, then he becomes a prey to all those who are disposed to despoil him. If the Court of Claims has not jurisdiction to pass upon the interests of these diverse claimants, in what court does it exist? The claimants oftentimes, and would in such cases, belong to different States, and could not be brought into court in order to have their rights contradictorily determined. There can be but one rational conclusion, and that is, that the Court of Claims had a right to compel the parties in this case to interplead one with the other, and to require all the suits to be tried together.

14. The further point in the same brief that "the depo-"sitions of the several witnesses taken in the case of Wood-"ruff & Bouchard in the Court of Claims were not admissi-"ble either against Elgee's executrix or against the execu-"trix of Haller Nutt." This may be true, since the Court of Claims held that each party must make out his own case as against the other, and that each case must stand upon its own merits.

4 Court of Claims, p. 486.

15th. THE RIGHTS OF THE SUCCESSION OF JOHN K. ELGEE.

The Court of Claims having found that the title of Elgee and Chambers to the cotton in question had been divested by their sale to Lobdell, its representative could have no further interest than to secure the price due upon it, and the question whether the Court of Claims had the right to render judgment in her favor for the amount, is not open to consideration, for Woodruff & Co. consented in open court that this might be done.

Record, p. 24.

If it be true, as the Court of Claims have found, that Lobdell was the owner of the cotton in question, and that

Woodruff & Co. were his lawful representatives in court, by reason of the assignment of his claim to them, then that the court made this award by their consent leaves them no grounds of complaint.

JULIA A. NUTT, EXECUTRIX.

Mrs. Nutt has but one question to determine, and that is, whether Haller Nutt in his pretended purchase of the cotton violated the non-intercourse act. This violation she concedes in her petition.

Record, pp. 4, 5.

As to the question whether Woodruff and Bouchard recovered all that they were entitled to of the proceeds of that cotton is a question with which she has no concern. If they are content with the award, then who has a right to complain?

16. The Attorney General makes a point against the standing of Mrs. Gaussen in the Court of Claims, which seems to be well taken. The claim of the succession of John K. Elgee was first filed by persons claiming to be his heirs, instead of being filed by the lawful representative of his estate, the testamentary executrix. It is a point about which there can be no question, that the heirs of a deceased person cannot, as such, administer the estate of their ancestor.

Bouvier's Law Dictionary, vol. 1, p. 83.

Mrs. Bessie Elgee Gaussen, dative testimentary executrix of that succession, the only person recognized at law to institute proceedings in behalf of the same, enters her appearance for the first time in the Court of Claims, on the 8th day of December, 1871, over three years after the time had expired for the filing of petitions for the recovery of the proceeds of captured and abandoned property. It was stated, in answer to this position taken on the argument of

the motion to remand this cause to the Court of Claims for a further finding, that it was too late to raise the question in this court for the first time; but the answer to that is, this is not a question of limitation, but one of jurisdiction, and that such a question can be raised at any stage of the case and in any court.

Haycraft *vs.* U. S. (Not reported.)
Innerarity's case, 19 Wall., p. 595.
Rhode Island *vs.* Massachusetts, 12 Pet., 657.
Carroll *vs.* United States, 13 Wall., 151.

The principle which applies to amendments under the statutes of limitation may be applied to the jurisdictional question arising out of the filing of Mrs. Gaussen's petition.

Statutes of Limitation as Affecting the Power and Right of Amendments.

In a suit in equity, brought against directors to enforce a personal liability for corporate debts, under Revised Statutes, chapter 38, section 25, "the plaintiff will not be allowed to amend his bill after a demurrer to it has been sustained, and after his demand is barred by the statute of limitations.

Merchant's Bank *vs.* Stevenson, 7 Allen, p. 489, (1863.)

New parties plaintiff cannot be substituted in a *scire facias*, by amendment where the necessity for different parties arose before suit was commenced; so held where the statute of limitation had run.

Willink & Willink *vs.* Renwick & Renwick, 22 Wendell, N. Y., p. 608.

In ejectment it is generally allowed, of course, to amend by inserting a new demise where the proposed lessor has a subsisting title; otherwise when the statutes of limitation have attached.

Jackson *vs.* Murray, 1st Cowan, 156.

Where a suit is commenced before the statute time has elapsed, and after it has elapsed third persons are brought in as defendants by amendment of the bill, the statute of limitations will avail the new defendants at the period when the amended bill was filed; and they are not to be effected by the proceeding during the time they were strangers to it.

Supreme Court, 1832, affirming S. & C., 1st McLean, p. 85, 1814.

Alexander *vs.* Pendleton, 8 Cranch, 462, S. P., the case of amendment by adding a demise in the name of another party asserting a different title. 1832; Sicard *vs.* Davis, 6 Peters, 124.

It would be a novel and unjust principle to make the amended bill relate back to the commencement of the suit, and thus render the defendants responsible for a proceeding of which they had no notice, and where a final decree in the case could not have prejudiced their rights. S. C. 1832, Miller *vs.* McIntyre, 6th Peters, 61.

17. Woodruff & Co. cannot complain. They are bound by the distribution of the proceeds made by the Court of Claims, because they voluntarily, in open court, consented to it: they have no hope of bettering their condition; they have been tied up ever since the rendition of the judgment of the Court of Claims by the parties appellant. They therefore respectfully ask that the judgment for Woodruff & Co. for the use of Lobdell and in their own behalf, may be affirmed.

B. F. Butler,
John A. Grow,
Of Counsel for C. V. Woodruff & Co.

Supreme Court of the United States.

THE UNITED STATES *vs.* C. V. WOODRUFF AND OTHERS.	No. 142.
BESSIE ELGEE GAUSSEN, Executrix, &c., *vs.* THE UNITED STATES.	No. 143.
C. V. WOODRUFF & Co. *vs.* THE UNITED STATES.	No. 166.
NUTT'S EXECUTRIX *vs.* THE UNITED STATES.	No. 223.

These cases are appeals from the Court of Claims, and are for the same lot of cotton, and covered by *one* judgment. They are, therefore, heard together *as one case*. We file this argument for C. V. Woodruff & Co.

First as to the title of Lobdell and C. V. Woodruff & Co.

The findings of the Court of Claims establish—

1st. The sale from Elgee & Chambers to Lobdell, and the taking of immediate possession by Lobdell of the cotton in controversy.

2d. That both vendors and vendee were *at the time* residents in Confederate territory, viz, Alexandria and West Baton Rouge, in Louisiana.

3d. That the property was at the time also within Confederate lines and outside of Federal lines. (Record, p. 36.)

4th. That the agreement between Lobdell and C. V. Woodruff & Co. was made in New Orleans, where both

parties were at the time, and where they resided, and that was *within Federal lines*. (Record, pp. 36, 37.) Before this time, and after the sale from Elgee & Chambers, the cotton was within Federal lines.

5th. The property remained all the while where it had been stored by the original vendees, Elgee and Chambers, until it was removed by the United States transports to Natchez. That Morris, who held possession for Lobdell, was duly notified of the sale from Lobdell to Woodruff & Co., and held the cotton for them after that sale, and continuously, up to the time of its removal to Natchez. He was in possession for them at the time of its alleged capture, and notified those taking it that it belonged to C. V. Woodruff & Co., who resided at New Orleans. *It was not abandoned.* The sale of Elgee & Chambers to Lobdell was effected and finally completed on the 31st of July, 1863, when possession was taken by Lobdell.

That Lobdell, Woodruff, and Bouchard have always borne true allegiance, and never gave aid or comfort to the rebellion. (Record, p. 24.)

These *acts* worked a complete sale and transfer, extinguishing the legal title of the vendor, vesting the right of property and possession in the vendee.

In the case of Elgee and Chambers, after their sale to Lobdell, nothing was left in the property for them to sell, although they may have retained an equitable lien on the proceeds for the balance of the purchase money.

The property, after this sale, was at the risk of Lobdell.

These facts constitute the transactions between these parties, as found by the court below, and fully establish their legality, as well as their *bona fides*. (See Record, pp. 22–25, for the findings of facts.)

As to the claim of Dr. Nutt—

The findings are that he resided in Natchez, Mississippi, then within the Federal lines, in October, 1863. That at that time he sent an agent from Natchez, *through the Federal lines* into the *Confederate lines*, to Alexandria, Louisiana,

to purchase cotton; that he made a bargain at Alexandria with Elgee for so much of this cotton as he (Nutt) should be able to get out in safety to a market, for £15 per bale, *to be paid at Liverpool*, the risk of the cotton, until it was got out, to be Elgee's. (See p. 22.) No cotton was gotten out, and none taken possession of, the contract being annulled by Elgee. (See p. 23.) The court, in their conclusions of law, find that the agreement was executory, and no property, or right of property, passed by it, and Nutt had no right to the proceeds, or interest in them, and the contract, because violative of the non-intercourse acts, was void. (Record, p. 26.)

The court likewise find that at the time Lobdell and Woodruff & Co. made the agreement of the 15th March, 1864, they were each and all of them residents of the city of New Orleans, then loyal territory, (Record, p. 23,) and that each and all of them "have always borne true allegiance to the United States, and have never voluntarily aided, abetted, or given encouragement to the rebellion against the United States." (Record, p. 24.) Also that Elgee took the oath of allegiance and faithfully kept it. (Record, p. 23,) That C. V. Woodruff & Co. were authorized by Lobdell to prosecute this suit for his benefit, (Record, p. 24,) to the extent of his interest in the same. (Record, p. 19.)

The cases were heard together in the Court of Claims, by order theretofore entered; and the judgment being in favor of the claimants, the court apportions the entire fund in favor of those parties respectively, the claimants (Woodruff & Co.) *consenting* thereto in open court, (Record, p. 24.) Neither of the other parties objected, but by their silence acquiesced in the same.

These are the material facts necessary to an intelligent consideration of the cases.

We do not suppose any question can arise on the claims of Lobdell and Woodruff & Co. The findings are conclusive upon every fact to establish their legal and equitable rights.

1st. The ownership of Elgee and Chambers is unquestioned. They raised the cotton on their plantations, named in the findings.

2d. Their right to sell to Lobdell is equally unquestioned; and his right to buy is quite as clear, without infringing any municipal law. Being consummated by Lobdell's taking actual possession, there remained nothing further to do to make the sale complete. The court expressly declare, as a conclusion of law, that the right of property "was vested in Lobdell,") (Record, p. 25,) and the court find that Lobdell authorized Woodruff & Co. to sue the claim. (Record, pp. 19 and 24.)

3d. The same is true of the sale of Lobdell to Woodruff & Co. being made in good faith, and no law infracted, all parties having the necessary legal qualifications to trade, the title passed, and the vendees were fully empowered to claim the proceeds from the Government, to the extent of the interest in them and as trustees for others. The court having so found, it was legal and proper that they should give the proceeds such direction as the claimants directed, and as was consistent with the facts proved.

The fact being found that the claim of Woodruff & Co., under the agreement with Lobdell, for the proceeds, was a valid one, the Government had no further interest in them than to have them so disposed of as that there could be no further claim against the United States for those proceeds. The court accordingly *awarded*, to the real parties interested in the fund, their shares respectively. (See Mrs. Carroll's Case, 13 Wall. 152.)

1st. They adjudged to Elgee's heirs what they were entitled to under the proof, as one of the claimants to the fund, as set up in their petition. It being a consolidated suit, the judgment for them was properly rendered in it. (Record, p. 17.)

2d. The balance of the fund was adjudged to Woodruff & Co., first, for the use of Lobdell, and, second, for their own use, being the residue, after deducting the purchase money due the original vendors of the cotton. The right

of Woodruff & Co. to demand the proceeds is found, and a decree for the specific performance of the agreement made and entered by the consent of the parties interested.

We do not suppose there can be any doubt of the jurisdiction of the court to dispose of the fund as they did.

Having lawfully obtained jurisdiction of the persons and of the subject-matter, it was an incident to the exercise of jurisdiction to bring before the court all parties interested in the fund, in order to the final disposal of it, so as to leave no claim to any of it undisposed of. It is not so much a question of jurisdiction as it is of power.

The jurisdiction was complete, as we have seen, over the parties and the subject-matter, when the proof of ownership of the property and the right to the proceeds concurred. Having arrived at that conclusion, the power to make a complete disposition of the proceeds followed. All the parties whose claims had been recognized in the proceeds being before the court, the power over them and over the fund to distribute it, by judgment of award, was a necessary corollary to the power to proclaim an award. But it was a judgment by consent. (Record, p. 24; see Turner's case, 2 C. C., 390; Mott's case, 3 C. C., 223.)

The language of the act is, that if a party claimant shall "prefer" his claim to the proceeds of such captured and abandoned property, and make certain proof, he is "to receive the residue of such proceeds," &c. Certain deductions are authorized to be made. Among them, "any purchase money." Here is authority to inquire into the equitable interests of parties in the proceeds, and authority to adjust claims upon it. That involves a wide range of inquiry which is enjoyed by every *nisi prius* court. Congress intended to give the Court of Claims full power to finally to dispose of all matters pertaining to the proceeds, and of course to have before them all parties in anywise interested in the fund.

It is a familiar rule, that when the court has once obtained jurisdiction, it can maintain it to the end of disposing finally of all matters of involved controversy. So

that if there had not been common consent in this case that the court should make the decree they did, nevertheless, they might have made it under the necessary powers which they possessed over the subject-matter, and the parties before them. But there was clear *consent*, alike binding on the United States and all parties then present. It is true the consent of the United States was not necessary, since their interest in the matter was that of a mere trustee, and went no further than to see that the proceeds were adjudged to the proper parties. The judgment of the court protects them. But this court has given to the Court of Claims all the powers, when exercising jurisdiction under this act, that are possessed by a court of general jurisdiction.

Anderson *v.* The United States, 9 Wallace, 71, 72.
Zellner, 9 Wallace, 216, 247.

There is another question raised by the other side, viz: Does the *situs* of the property control in determining the question as to whether there is a violation of the non-intercourse act. We suppose not.

1st. The rule is, that personal property follows the domicile of the owner, and its particular location at the time of sale does not affect the rule. As in the sale of a ship at sea, or the transfer of a bill of lading of goods *in transitu*. The title in the property passes in each case, on the principle just stated. The person of the owner draws the property to it, and the law of the domicile of the owner prevails. In this case the law of Louisiana must be referred to, and will constitute the rule for its determination. All parties, to both contracts, were citizens of Louisiana, when the transactions took place. If the fact were that the property was in Mississippi, and within rebel lines, (not admitted,) that does not change the rule, as we have seen on this point. (See Montgomery *v.* The United States, 15 Wall., pp. 400, 401.) In that case the Supreme Court expressly recognize this doctrine.

The sale in that case was pronounced invalid because

one of the parties resided in rebel lines and the other in Federal lines.

But the court say, as to Burbridge & Co., the agents, who did reside in Federal lines: "They might have sold their lien, (on this property, lying within rebel lines,) or the debt secured by it, and had they done so the sale would have involved *no trading with the enemy.*"

Both sales in this case would have been valid by the laws of both the States of Louisiana and Mississippi without delivery. In the latter, because it is in writing, (see Code of Mississippi, 1857, sec. 4, p. 359,) and in the former, because delivery was not necessary to pass the title as between parties to the sale, their heirs or representatives, but only as regards third persons, who had acquired an interest in the thing sold adverse to that of the purchaser; *and here there is no such third party.* But the question should be determined by the laws of Louisiana, as both contracts were to be performed, at least in part, in that State. (Story's Conflict of Laws, secs. 378, 379, 81, 83, 85, 86, 87, 88, 89, 90.)

See p. 15

The agreement to sell to Lobdell made by Elgee & Chambers provides that the cotton shall be shipped by Da Silva & Co. to New Orleans, (Record, p. 361,) and paid for when delivered. This is a provision that the cotton was to be paid for at New Orleans. And the agreement by Lobdell to sell to Woodruff & Co., dated March 15, 1864, provides for payment of the purchase money in New Orleans. Thus, both agreements were to be consummated in New Orleans, where the cotton was to be weighed and delivered. This makes the transactions determinable by the laws of Louisiana, to which alone they are referable.

Now, by the laws of Louisiana, the delivery of property is not necessary to the completion of the contract. (See articles 24–31, Louisiana Code, for the most explicit authority on this point; and for adjudications under it, see Robinson's Rep., 26; 3 Rob. 331; 11 Rob., 349, 362; 12 Rob., 474, 478.)

Article 2433 of the Code does not militate against this

view, when fully understood. There is an apparent ambiguity in the words "*en ce sens*" as therein used. Those words mean, when correctly translated, "*in this sense.*" The expression means that when property is sold by weight, &c., it is at the risk of the seller until it shall have been weighed, &c., but that in other respects it is perfect, and may be enforced by either party against the other. This article is borrowed from the Code Napoleon, and corresponds with article 1585 of that work; and such is the interpretation given it by Duranton, vol. 16, No. 31; also, 87, 88.

It is, also, held in Louisiana that parties may regulate this thing by agreement, and the purchaser may take the risk on himself. In that case the sale is complete in all respects before the weighing. (10 Louisiana Annual, 249; 21 *ib.*, 534.) This is also the common law. (Benjamin on Sales, 218, 219, 220, 223, 224.)

Thus the sale was valid by the laws of Mississippi, by the common law, and by the law of Louisiana.

Here, by express agreement, the cotton was at the risk of Lobdell after the sale from Elgee and Chambers. Having possession of it, if it had been destroyed after the sale, it would have been Lobdell's loss. (Record, p. 37.)

But whatever may be the legal statute of the agreement between Lobdell and Woodruff & Co., so far as transferring any interest in the cotton was concerned, and however it may have affected or may not have affected a transfer of the property in the cotton, is not of much consequence in the present hearing of the case. The judgment of the Court of Claims is in favor of the right to the proceeds by force of the title of Lobdell. They, obviously, meant to hold, and do hold in fact, that Woodruff & Co. were correctly setting up and relying on that title for the proceeds of the cotton. Being transferred to them, first, by the agreement of the 15th March, 1864, (Record, pp. 36, 37;) and, second, by the specific assignment of the 3d May, 1864, (Record, p. 36,) the court find that these acts of assignment were to enable them to institute a suit for the proceeds. By the first

transfer Lobdell sold them the property for a specific price, subject to certain liens thereon subsisting at the time, retaining the right of property and ownership in himself, (Record, p. 37;) and, by the second, to enable them to make the proper claim for it in the proper court. This suit is prosecuted under that title, and the court find the ownership under it. They recognize Woodruff & Co. as the proper parties to sue under the license and assignment of Lobdell. It is the title of Lobdell which is adjudicated, and *his* ownership is ascertained and authorized. (Record, pp. 24, 25.) The distribution of the fund is only an incident to the finding of ownership, and necessarily follows the consent of the parties in open court. The liens are marshalled according to the findings, and the distribution follows that act of marshalling.

It is to be observed that neither in the "findings" of the court, or those presented by Elgee's heirs, (Record, p. 28,) nor in any other part of the record, is there any objection to the manner of apportioning the fund or to the form of the judgment, which is that Lobdell was the owner, the right of property being vested in him, "with a lien thereon vested in said Elgee & Chambers."

It is said that because the bill of sale from Elgee and Chambers to Lobdell provided that the cotton should be shipped to Fort Adams, and because it is alleged that Fort Adams was within the Federal lines at that time, that makes the contract invalid, being in contravention of the non-intercourse act. There are two radical objections to the correctness of this proposition:

1st. There is no evidence that Fort Adams was at the time within the Union lines.

The court fails to find that fact; and

2d. The cotton was not removed, or attempted to be removed, to Fort Adams, or anywhere else, and when taken it was at the place where it was stored, when it was sold to Lobdell. It cannot be supposed that it was the *intention* of these parties to violate the law. Unless they did violate it by actually attempting, or did actually carry it to Fort Adams, in violation of law, they do not fall within its pro-

visions. The presumptions are all the other way, viz: that they did not intend to move the cotton until duly and legally authorized to do so. But the act is not violated unless the parties to the transaction are citizens of different States, one in rebellion and the other not, or unless the "goods and chattles, wares and merchandise are coming from a State or section (in insurrection) into the other parts of the United States," &c., when arrested. * * In that case the property is forfeited. (See section 5, act of July 13, 1861.) The goods must be put in motion, and be actually in progress from a Confederate to a Federal State, before they are liable to forfeiture under that act. Here both contracting parties were residents of enemy territory, made the contract in enemy territory for property lying in that territory, and did not attempt in any manner to remove the cotton into the Union lines. So that neither the parties nor the property fall within the statute, and are not antagonized by this law. But there is nothing in the findings to show that Fort Adams was not outside of the Union lines at that time.

It is also a mistake of fact to say that there was anything remaining to be done to perfect the sale and transfer of the cotton sold by Elgee and Chambers to Lobdell.

1st. It was taken possession of, and was at the risk of Lobdell the moment the paper was signed.

2d. The bales were rated at 500 pounds each in the contract or agreement.

3d. It was to be shipped to and received by the house, of Da Silva & Co., of New Orleans. (Record, p. 36.) Thus, both contracting parties agreed upon a place of deposit, and the merchants who should receive the cotton at the common cotton market of the south, where usually payments are made for large lots of that staple. So that, if there was no specific agreement that the cotton should be at the risk of the buyer, and there was no agreement as to the weight of the bales, this agreement, that the cotton should be shipped to the common merchant of both parties, waived every other consideration, and made the sale valid. But we have seen that the sale otherwise was valid

by the law of Mississippi and the law of Louisiana, and passed the complete title to Lobdell.

It is also a mistake of *fact* to say that when the agreement between Lobdell, Woodruff and Bouchard was made, they did not all reside in New Orleans, loyal territory. The Court of Claims expressly find that they were citizens of New Orleans at that time. (Record, p. 23.)

It is also a mistake of fact to say that the record shows that there was any evidence used at the hearing in the Court of Claims not properly and legally applicable to all the cases. The record being silent, the presumption is that all was legal in this respect.

Record pp. 18-19-

It is also a mistake to say that Lobdell was not a party to the record, when these cases were tried in the court below.

There is nothing which shows that he was not present and pressing his claim; but on the contrary, the court, in its "judgment," (Record, p. 19,) uses this language: "It appearing that the said Charles S. Lobdell has consented to this suit being prosecuted by said Woodruff and Bouchard, to secure his interest in the fund, and that it is to that extent prosecuted by them for his use and benefit." And in their findings, (Record, p. 24,) they find, that "C. V. Woodruff & Co. were authorized by Charles S. Lobdell to prosecute this for his benefit." So, too, in the caption of the entry of judgment, (Record, p. 18,) and of the findings of fact, (Record, p. 21,) Lobdell's name is used as one of the parties claimants. So, also, as to some of the previous entries, (Record, p. 15,) his name appears as a claimant; and, finally, there is not a thing in the record that shows that he was not all the time in the case; the contrary being true. The court held and considered him in the case, and that C. V. Woodruff & Co. represented him by his own consent.

If the finding of the fact was not conclusive, these entries would make it so, followed by the award in his favor.

It is a mistake to claim that Lobdell's assignment of the Elgee & Chambers contract, (Record, p. 36,) after the seiz-

ure of the cotton, was in violation of the statute. (10 U. S. Statutes at Large, p. 170.)

1st. Because it was only in further assurance of the transaction of the 15th of March, 1864, (Record, p. 36,) which was made before the seizure, and transferred the contract; and—

2d. Because the court find that the evidence in the case shows that it was made for the purpose of enabling C. V. Woodruff & Co. to prosecute the claim for his (Lobdell's) benefit, as well as their own. The court took all the circumstances together, and found that that was the purpose of the assignment. So that, if that statute could be made to apply to this class of claims, a proposition wholly inadmissible, the question is not well taken in view of the court's findings, which must control this court.

The Court of Claims was bound to find who was the owner of the cotton, and by their judgment direct the Government to whom it should pay the proceeds. Now, that court having found that the sale to Lobdell carried the property and gave him and his assignees the proceeds, it is perfectly plain that the court could, under the law, declare to whom they should be paid.

It is equally plain that those proceeds must be "the residue * * after the deduction of any purchase money which may have been paid, together with the expenses of transportation and sale of said property, *and any lawful expenses attending the disposition thereof.*"

It is objected that certain custom-house fees and internal revenue taxes were deducted. This is a mistake, we suppose, because the court in its findings (Record, p. 24) names the items deducted, and these do not seem to be among them. The freights, charges, and expenses were incurred "prior to said sales," and as such were competent and proper to be allowed.

Certain it is that there is nothing in the record which shows, or tends to show, that they were not legal and proper.

And it is also objected that the payment of the sum of sixteen thousand dollars, "legal expenses," was illegal.

We are not able to see how that objection is made out. The court is charged with the duty of deducting "any other lawful expenses * * attending the disposition thereof." It does not appear how those legal expenses were incurred, but that they were incurred in the disposition of the property, while in the hands of the United States authorities, we suppose must be inferred, because the court find they ought to be deducted. (Record, p. 24.) That is conclusive, as the record stands. It is likewise objected that the two items (Record, p. 24) paid to Camp & Smith were unlawfully allowed; for it seems that they were paid on account of a contract made with the former by the United States for collecting this identical cotton. We are not able to see anything in this record which will justify the claim that this was an illegal payment.

See p. 20

It is also objected that there was no warrant of law for the action of the Court of Claims in requiring these claimants to interplead with one another and with the United States. We suppose there is nothing in this point. This court has held in Anderson's case, (9 Wall., 56,) that this captured and abandoned property fund is a *trust fund*, held by the United States, as a trustee, for the benefit of the *cestui que trust*. Now, the Court of Claims has held, uniformly, that they could require parties who file separate claims in that court for the same lot of cotton to interplead.

Turner's case was the first in order. (2d C. Cls. R., p. 390.) This is the rule in equity, and seems to be very appropriate in its application to this class of cases in the Court of Claims. It enables that court to do precisely the same thing that a court of equity does, viz: settle all claims to the proceeds of the same property in one suit.

It is asserted by the United States, on p. 8 of the Attorney General's first brief, "that unless Woodruff & Co. can establish *specific* rights as to the cotton bought of Lobdell, they cannot follow a fund arising from its sale."

To this we have to reply—

1st. The Court of Claims finds that, after the contract of sale by Lobdell and Woodruff & Co., on the 15th of March, 1864, *before the seizure of the cotton*, Morris, who

held the cotton in possession for Lobdell, "was informed of its sale by Lobdell to C. V. Woodruff & Co., and thereafter *continued* such custody as he exercised before." (Record, 23.) Again, same page, when Camp took possession of the cotton, "Mr. Morris objected to the taking of said bales, that the cotton had been purchased by Woodruff & Co."

2d. These circumstances gave Woodruff & Co. a *special title* in the cotton, and, as against every body, unless it might be Lobdell, the right to its possession and control.

3d. Lobdell consented to their taking possession of the cotton, but he likewise authorized them to sue the claim in their names; thus continuing the trusteeship of the cotton into the proceeds, as they were held by the United States. Now, the rule is, as laid down by the Court of Claims, and as is applicable to trust property generally, that the "*ownership*," which is spoken of in the act of March 12th, 1863, is such ownership as would enable the party to maintain "*trespass*" or "*trover*." (Margaret Bond's case, 2d vol. C. of C. Reports, p. 529.) And this court has decided that it embraces an administratrix, and maintains her right to assert "ownership" of the cotton and the proceeds. Carroll *v.* The United States, 13 Wallace, p. 152. That case cites to the point, that although the administratrix had not absolute ownership in the proceeds of the cotton, nor in the cotton, yet she might maintain "*trespass*" or "*trover*," these authorities: Redfield on Wills, 114 and 116, 1 Williams on Executors, p. 596, and other cases.

So tnat Woodruff & Co. had *specific* rights of ownership in the cotton and in the proceeds, and might well maintain this action for the latter. They were trustees for themselves, for Lobdell, for Elgee's legal representatives, and all others interested in these proceeds.

In answer to the brief filed last and solely for Elgee's Executrix, I desire to make a few observations, some of which will be necessarily cumulative.

THE ELGEE CLAIM.

In that brief the counsel contends that the sale of the cotton by the deceased and Chambers to Lobdell was void, 1st. Because the cotton was not delivered; 2d. Because the agreement to transport it to Fort Adams was a violation of the non-intercourse law. To which, we answer, as we have heretofore argued:

1st. A delivery was made. On this point we refer the court to the able opinion of Judge Loring (7 Nott & Hunt., 614) and what we have heretofore written in this brief.

2d. No delivery was necessary. By the contract, the cotton was to be shipped to New Orleans, where both parties resided, and where it was to be weighed and paid for. For both these reasons, that was the place of the contract. It is, we think, uniformly held that, as between the parties themselves, a sale of personal property that is valid by the law of the place where the vendor has his domicile, is valid everywhere.

Story's Conflict of Laws, ch. 9, sections 374 to 390.
Shiff *v.* La. St. Ins. Co., 6 Martin, N. S., p. 633.
Beirne & Burnside *v.* Patten, 17 La., p. 589.
Olivier *v.* Towne, 2 Martin, N. S., p. 93.

It is also generally held that a contract is considered as made where it is to be performed or the price paid—"*ubi solvenda est pecunia.*"

Story's Conflict of Laws, secs. 233–235.
2 Kent's Comm., Lecture 39, p. 459.
Bank U. S. *v.* Daniels, 12 Pet., 54.
Bell *v.* Bruen, 1 How., 169–182.
1 Cranch C. C., 583.
1 Gallison. 371.

I have already shown that, by the law of Louisiana, a sale is complete as between the parties without delivery. Even a promise to sell is equivalent to a sale.

Louisiana Civil Code, art. 2437.
Barrett *v.* His Creditors, 12 Rob., p. 474.
Stevens *v.* Chamberlin, 5 La. Ann., p. 657.

The fact that the cotton was not weighed did not prevent the sale being complete, because, looking to the possibility of its capture or destruction, before it was weighed, the parties agreed upon an average weight, so that, if the cotton had *all* been captured or destroyed, the contract might have been enforced by the seller. Indeed, the larger portion of it was destroyed without being weighed. Yet Elgee, executrix, has obtained a judgment in her favor for the whole amount at the original contract price. Nor was the fact that no portion of the price was paid (except a small sum as earnest money) a reason why the sale was not complete, because, by the agreement, the residue was not to be paid for until it was delivered in New Orleans.

As to the second objection. Supposing it to be true that the place where the cotton was stowed was within the rebel lines, and that Fort Adams was without them, (neither of which facts is found by the court,) I am at a loss to perceive how a mere agreement to transport the cotton from the one place to the other, in the absence of any evidence that it was even intended to do this in violation of law, would involve a violation of the non-intercourse law. In fact, any attempt to ship the cotton to New Orleans until it could be done lawfully would have exposed it to inevitable seizure and forfeiture.

Both the briefs of the counsel for the executrix of Elgee are chiefly employed in showing that the contract between Lobdell and Woodruff & Co. was null, and even if it were not, that Lobdell was not a party to the suit, and therefore that no judgment could be rendered in his favor. In addition to what we have said, it is a sufficient answer to all this to say that these are matters with which Elgee's exe-

cutrix has no concern whatever. Either the sale of Elgee to Lobdell was valid or it was not. If it was valid, his estate has no interest in the fund, except to secure the payment of the price, and his claim for that is not contested. If, on the contrary, it should be determined that the sale is not valid, then any sale of the cotton made by Lobdell would be a nullity. It is, therefore, immaterial to Elgee's estate whether the sale by Lobdell to Woodruff & Co. is valid or not. But, even if Elgee's estate had any right to make these objections, they can be easily met and over come. In regard to the validity of the sale to Woodruff & Co., the arguments of counsel are based entirely on the supposition that the contract is to be governed by the common law. In this they overlook entirely the fact that the contract was made in New Orleans, where all the parties resided at the time. (Record, p. 23.) Consequently the validity of the contract must be determined by the law of Louisiana, tested by which its validity is unquestionable. See what I have already said on this subject in another part of this brief.

As regards the objection to the proceedings, we have to repeat, Lobdell *was* a party to the suit. At pp. 23, 24 of the Record, the court will find two papers signed by Lobdell, both dated 3d May, 1864, which were evidently intended to modify or explain the agreement of the 15th March preceding, and in furtherance of it. They are somewhat inconsistent; but the court below, adopting the construction least favorable to Woodruff & Co., (who contended that they authorized them to prosecute the claim for his own use,) held that the only effect of these papers was, that they authorized them to prosecute the claim for the use and benefit of Lobdell and themselves.

7 Nott & Hunt. C. of C., p. 625.

If this interpretation be correct, and no one complains of it, Woodruff & Co. do represent Lobdell in this suit, certainly to the extent of his claim. If they had been unable to show any such interest in the fund as would enable them

to maintain the action for their own benefit, they would have been enabled to sustain it for the use and benefit of Lobdell.

But the court below held, that under the law of Louisiana, by which the case is to be determined, Woodruff & Co. did hold such a proprietary interest in the claim as entitled them to maintain the suit for their own use, to the extent of their interest, as also that they were authorized to maintain it for the use of Lobdell, to the extent of his interest. This is just what was done by the judgment. This judgment may or may not be technically correct, but why it should be considered irregular in form or substance I am unable to perceive.

The counsel for Elgee's estate have argued this question as if this were a suit by Woodruff & Co. against Lobdell to enforce a specific performance of their agreement, and to which, they say, Lobdell was an indispensable party. But we say this is no such suit; There is no contest, no conflict of interest between Woodruff & Co. and Lobdell. They both seek to carry the agreement into effect. It was for that purpose that Lobdell authorized Woodruff & Co. to prosecute this suit. The court below determined that they could also prosecute it *pro tanto* for their own benefit, and a judgment protects the interests of both. What irregularity is there in this? What injustice is done to any one by it?

The counsel for Elgee's estate contend, however, that the court had no right to take cognizance of any lien or of any *jus in re* in the fund short of an absolute ownership. So that, where several parties have an interest in the fund, the court has no power to distribute it among them, but must award the whole of it to one party, leaving to the others their recourse against him. If this were true, the object for investing the Court of Claims with jurisdiction over these claims would be defeated, and the court would become an involuntary instrument in the hands of dishonest claimants to aid them in the perpetration of fraud. But this is not true. The powers of that

court and its proceedings are peculiar, partaking somewhat of those of a common-law court, and largely of those of a court of equity. It is not, therefore, in the practice of either of those courts that you must look for precedents to determine the regularity of its proceedings. We must look, for that purpose, at the law by which it was established, and by which jurisdiction was given to it over certain classes of cases. It cannot be supposed that Congress, in passing the act of 12th March, 1863, intended, whenever several parties had a beneficial interest, recognized and protected by law, in the property, when it was seized, practically to deprive all of them, except one, of their legal right in its proceeds by paying them all over to the one that should be determined to be the titular owner, and leaving to the others only a personal claim against the latter.

The 3d section of the act shows that no such injustice was contemplated, for it refers to a case where an amount due to another party than the owner shall be deducted; that is, be retained in the Treasury. So that, in this case, if Elgee or Lobdell had not been parties to the proceeding, and the court were of the opinion that they were entitled to a portion of the fund, they would not have dismissed the claim of Woodruff & Co., because they had not been made parties, but would have retained in the Treasury the amount due them until they could take steps to obtain it. The only necessary parties in the case are a claimant and the Government. The latter acts as trustee for the benefit of all parties concerned.

Elgee's representatives complain of a certain order made by the Court of Claims, the object and effect of which was that all the claims should be tried at the same time. (Record, pp. 16–18.)

We do not see how any one could have been injured by this order. On the contrary, as it enabled each of the claimants not only to watch over and protect their claims, but, if they thought proper, to oppose the claims of others that conflicted with their own, Elgee's estate could cer-

tainly not have been injured by it, as that case is not included in the order.

They also complain that several items of expense were improperly allowed by the Secretary of the Treasury and by the court below. We think this complaint is *well* found, and if it be so, as there is no finding of the court that all the items in the account of the Secretary are correct, we hope the court, if they can, will deduct the amount allowed to Camp and Prescott Smith—$45,000. We also think that the court erred in apportioning the interest on the bonds between the claimants, among whom the principal was distributed. The bonds represented the cotton, and if the latter belonged to Woodruff & Co. or to Lobdell, the former did also. On the other hand, by the law of Louisiana, a debt arising on a contract does not bear interest, unless it be expressly stipulated in writing in the contract. (Civil Code, art. 2895.)

7 La. R. 520
6 Mar 278

As neither the agreement with Elgee nor that with Lobdell contains any such stipulation, no interest is due on the price which the purchasers agreed to pay.

We therefore assigned as error that portion of the judgment which orders that the interest on the bonds be distributed among the claimants, & ask that the Judg't be so far modified.

One of the counsel for Elgee states that, when the cotton was seized by the Government, neither Lobdell nor his assignees asserted any right to it. I must suppose that the author of this assertion forgot what the court find, on page 22 of the record, viz, that Morris was employed by Lobdell at the time of his purchase to take care of the cotton, and that he continued that care till it was taken possession of by the United States; and also what is found on page 23, viz, "that said Morris had the custody thereof as theretofore, and was informed of its sale by Lobdell to C. V. Woodruff & Co." Again: when Camp took possession of the cotton, the court find, (p. 23) "*Mr. Morris objected to the taking of said bales; that the cotton had been purchased by Woodruff & Co.*" Morris *spoke and acted as the agent of Woodruff*

& Co. Gordon (same page) says it had been purchased by a firm in New Orleans.

This same counsel asserts, *as a fact*, that neither Lobdell nor Woodruff & Co. made a movement in the way of the assertion of a right to the cotton "*until some five years afterwards.*" If he had but referred to the record in the court below, he would have seen, and ought to have known, that Woodruff & Co. filed their petition for this cotton on the 26th day of April, 1865, about one year after the Government's seizure.

Said counsel also seems to have overlooked the fact found by the court, on page 24, "that at the time of making the contract between Elgee and Chambers and Lobdell, on July 31, 1863, and until the seizure of the 572 bales by the United States, above stated, the removal of said 2,100 bales of cotton from where it was stored on Buffalo bayou, without a strong force to protect it, would have subjected it to the peril of being destroyed by the Confederates or raiders." This shows why neither Lobdell nor his assignees undertook to move the cotton. But there was another reason, and that was, that without the license of the proper authorities of the United States, it could not have been moved into the federal lines. The fact that it was perilous to the cotton to attempt its removal at any time, is shown by the fact that all of it that remained was burnt as soon as the 572 bales were moved.

This same counsel seems to have overlooked the fact that, after the Government seizure, both Lobdell and Woodruff & Co. were powerless to do anything to take any lawful steps to assert their right to this cotton or its proceeds. They had no "lot or part" in the course pursued by Elgee in bringing a replevin suit against the Government agent for the cotton, and knew nothing of it. That proceeding was illegal, and resulted in nought. They (Woodruff & Co.) could not lawfully have maintained their suit in the Court of Claims for the proceeds until the cotton was sold and the proceeds paid into the treasury. As it was, they commenced too soon, for the proceeds were not

paid into the treasury until after the replevin suit was decided at St. Louis. (Record, p. 38.)

Until they reached the treasury, no right of action could be maintained.

See sec. 3d of act of 12 March, 1863.

There was no other forum but the Court of Claims in which suit could be brought, and that is specially provided by the "captured and abandoned property act."

See Mrs. Alexander's cotton, 2d Wallace, 404.

Thus it would seem that Lobdell and his assignees did not "sleep on their rights," but moved within the provinces of the law as far as they might do.

The same counsel seems to labor under the impression that to maintain this action the "ownership" spoken of in the statute must be an *absolute* ownership. I have already had occasion, in another part of this brief, to show that this is a mistake. Any ownership which would authorize trover or trespass is sufficient special property in the thing, however qualified. Here the "ownership" was so far manifested as that the property was at the sole risk of the purchaser, which is a greater estate than that of a mere trustee. It is such an estate as gives him dominion over the property, to the full end that he may protect himself, his interest in the thing, and be able to drive away trespassers and wrong-doers.

It was not a *simulated* sale. The court determine the *bona fides* when they find the fact that it was a valid sale from Elgee and Chambers to Lobdell, and that the right of property in the 2,100 bales of cotton therein specified was vested in said Lobdel. (Record, p. 26.) All allegations of fraud or corruption or irregularities *aliunde* the Record are obviously improper. The insinuations of this same counsel, that things have transpired since the trial which would go far towards militating against the good faith and honesty of the claims of Lobdell and Woodruff & Co. are gratuitous. If this was true, it could not avail here, and,

so far as advised, anywhere else. The "findings" and the "judgment" conclude his client, and exclude such insinuations.

Is it not a mere gratuity for counsel to say that "at the time, to wit, 15 March, 1864, both Lobdell and the cotton remained within the rebel lines," &c., in the face of the expressly proved fact that "at the time of making this contract Lobdell, Woodruff, and Bouchard were citizens of and residents in the city of New Orleans, then loyal territory," (Record, p. 23,) especially when it is considered that there is not a word of proof that the property was within rebel territory at the time of this sale. The fact that the authorities of the United States, without the aid of the military, went to the place and captured it without resistance, is a pregnant circumstance, at least, tending to show that the cotton was within the Union lines. The Federal military lines had been advanced, as they were being advanced constantly, so as to embrace this point in Mississippi. This is the fairer inference, in the absence of positive proof or findings of facts on the subject.

In the Record, (p. 1,) in the amended petition of Woodruff & Co., as well as in the original petition, is an averment that they (petitioners) applied to the then Treasury agent at Natchez, within whose district the cotton then laid, for permit to remove the same, "the same being then within the military lines of the United States," which was granted.

Thus, it appears, 1st, that Woodruff & Co. did take steps to move this cotton to New Orleans as early as the 3d of April, some days before the seizure by Camp; and, 2d, that the cotton was treated as being within our lines at that time, as this application was granted by that agent.

In the second brief of Elgee's counsel much stress is laid on the fact that there was no actual delivery under the Elgee & Chambers contract with Lobdell, and much verbal criticism is indulged in to make that good. I have already, in an early part of the argument, given my views on this point, but it may not be amiss to *emphasize* them here. 1st. There can be no reasonable doubt that the in-

tention of the parties, gathered from the instrument, was to accompany the act of sale by a delivery. 2d. At common law it was a good and valid sale. 3d. By the code of Mississippi, *the contract being in writing*, it was a valid sale, and no delivery was necessary. The property was in Mississippi, and the parties there also at the time, and if the laws of that State are to govern, it was a valid sale, with or without delivery, because the contract of sale was reduced to writing. The language of the 4th section of the code of that State, 1857, p. 359, is this substantially:

Article four of chapter forty-four enacts that no contract for the sale of any slaves, personal property, goods, wares, and merchandise, for the price of fifty dollars or upwards, shall be allowed to be good and valid, except the buyer shall receive the slaves, or part of the personal property, goods, wares, and merchandise, or shall actually pay or secure the purchase money, or part thereof, or unless some note or memorandum in writing of the bargain be made and signed by the party to be charged by such contract or his agent thereunto lawfully authorized.

4th. But if governed by the laws of Louisiana, where vendors and vendee resided at the time of sale, the sale was undoubtedly valid.

In either of these views we are unable to appreciate the force of much that is contained in the second brief of the Elgee counsel.

Some Additional Remarks on the Brief of Attorney General.

In the first place, that brief admits the sale from Elgee & Chambers to Lobdell. (p. 6 of brief.) Now, as it is admitted on all hands that Elgee & Chambers were the original owners of the cotton, and as Lobdell's loyalty is found by the court, it is evident that the fund belongs either to him or to Woodruff & Co., or in part to each. It follows, therefore, that, in either case, the Government has no claim to the fund, but holds it in trust for one or both of these parties. As the Government will be pro-

tected by payment of the fund to whomsoever it may be adjudged is entitled to receive it, it has no interest in this controversy. In fact, I do not understand the Attorney General as making any claim on behalf of the Government, but suppose that his remarks in regard to the rights and obligations of the claimants, *inter se*, are intended merely as suggestions to the court. We beg leave to say a few words in regard to some of these objections.

In the first place, he says that Lobdell is entitled to no portion of the fund in dispute; that Lobdell sold Woodruff & Co. the cotton at "thirty cents a pound—that is, the cotton they should receive—and that as they only received 572 bales, producing $81,545, and were condemned to pay Elgee's estate, for Lobdell, a much larger sum, Lobdell therefore owes them the difference. The court below construed the contract differently. Their view of it was, no doubt, that what Lobdell sold to Woodruff & Co. was not the cotton, but "a certain contract" which he had previously made with Elgee & Chambers "for the delivery" of the cotton. That, as by the terms of this contract, the cotton was to be at the risk of Lobdell, if any portion of it should be lost, the loss would be his and not theirs. That Woodruff & Co., having purchased this contract, with all its terms and conditions, and having agreed to pay Elgee & Chambers on receiving the same $100,000, or ten cents per pound, in paying this sum Woodruff & Co. would be paying their own debt, or rather a debt of Lobdell's which they had assumed. That the clause by which Woodruff & Co. agreed to pay on what they might receive applied only to what they owed Lobdell, and not to Elgee & Chambers. I confess this was my own construction, but the point was overruled below. In deference to the opinion of the Attorney General, I adopt his suggestion, so far as to bring the matter before this court. I therefore assign that as error, to the end of modifying the judgment to that extent.

There is one point in which I must respectfully dissent from the opinion of the Attorney General, and that is, that a distribution made, under a final judgment rendered

in this case, will not make a final disposition of the fund, but will only open the door to future litigation between the claimants.

Property taken possession of by the Government, under the act of 12th March, 1863, being captured in hostile territory, is, in a technical sense, "enemy's property," and it may therefore be dealt with as the Government thinks fit.

Congress deemed it proper to distinguish between property which belonged to parties who were, in a strictly legal sense, enemies, were *personally loyal*, and those who were not, and to give the former the right to demand that their property or its proceeds be restored to them. This, however, was an act of liberality, and the Government had the right to affix to this liberality such conditions as it deemed proper. It did attach certain conditions to it, among which was, that these claims should be presented to the Court of Claims within a prescribed period, and that that court should have the authority to determine in all cases who was the rightful owner of the proceeds, and when such right was established to its satisfaction, to direct that they be paid over to him. (Sec. 3 of act of 12th March, 1863.)

We have no doubt that it was the intention of Congress that the determination of this question by the proceedings under the act, between the claimant and the Government, should be final and conclusive, not only as against the Government, but as against other claimants, particularly against those who had been heard in support of their claims, and in opposition to that of the successful claimant. This court has decided that the Government is a trustee of the fund for the benefit of all whom it may concern. All suits on claims against it must therefore be brought against this trustee, and a judgment rendered therein establishes the ownership of the fund as against everybody. Whatever the original title of the successful claimant may have been, the judgment itself, after it is rendered, constitutes his title. Other parties may have claims against him personally, arising out of the fund or the judgment, but not against the fund itself. If it were otherwise, why should Congress

authorize him to receive the amount as soon as the judgment is rendered?

By what I have said in the early part of the brief I do not wish to be understood as admitting that, when the court below requested the counsel of Woodruff & Co. to say whether they consented that the decree might be entered *apportioning* the fund to those who might be found to be entitled to it, according to the agreements, we were to be bound by any particular sums which the court might award. We agreed only to that *principle* of distribution, and so the record states. We certainly did not intend to agree to all that might be done in advance of its being done, without knowing what it was to be. Our consent did not go that far. I make this remark on account of the misapprehension which has found its way into some of the briefs of some of the counsel, which seem to proceed upon the idea that that consent precludes an examination of the correctness of that distribution in this court. We understand it to be open for examination, but the principle is not.

R. M. CORWINE,
Of Counsel for C. V. Woodruff & Co.

Supreme Court of the United States.

No. 166.

C. V. WOODRUFF *et als.*, APPELLANTS,
vs.
THE UNITED STATES.

Nos. 142, 143, 223. *Cross Appeals.*

Supplemental Brief on the part of C. V. Woodruff et als., Appellants and Appellees in Nos. 142, 143, and 223.

THE FACTS FOUND RELATING TO TITLE.

The property in controversy on the 31st day of July, 1863, was in Elgee and Chambers, situated at a place known as "The Rocks," in Wilkinson county, Mississippi, in the care of William C. Gordon, the duly authorized agent of Elgee and Chambers, to make in their behalf a contract of sale thereof; that the "Rocks" were then without the Federal military lines, and that Gordon and Lobdell were together there (Record, pp. 21—22) at the date of the contract of sale, which is as follows:

"MISSISSIPPI, *Wilkinson County.*

"We have this 31st of July, 1863, sold unto Mr. C. S. "Lobdell our crops of cotton now lying in the county afore- "said, numbering about 2,100 bales, at the price of ten "cents per pound, currency, the said cotton to be delivered

" at the landing of Fort Adams, and to be paid for when
" weighed, Mr. Lobdell agreeing to furnish at his cost the
" bagging, rope, and twine necessary to bale the cotton un-
" ginned; and we do acknowledge to have received, in or-
" der to confirm this contract, the sum of $30. This cotton
" will be received and shipped by the house of Dasilva &
" Co., New Orleans, and from this date is at the risk of
" Mr. Lobdell. This cotton is said to have weighed an
" average of five hundred pounds when baled.

" W. C. GORDON,
" *Agent for Messrs. Elgee and Chambers.*
" C. S. LOBDELL."

At the time of making this contract Lobdell was a citizen of West Baton Rouge, and Elgee and Chambers were residents and citizens in Alexandria, Louisiana, and that both West Baton Rouge and Alexandria were disloyal territory; that immediately upon the sale Lobdell employed J. H. Morris, living near the place where the cotton was stored, to watch it and take care of it for himself, and paid him therefor; and that Morris continued his care of the cotton until it was taken away by those claiming to act for the United States.

Record, p. 22.

That on the second of April, 1864, B. F. Camp, claiming to be an agent of the Treasury Department, and to act in behalf of the United States, took and carried away five hundred and seventy-two bales thereof; that Mr. Morris, its custodian for Lobdell, objected to the taking; claimed that it had been purchased by Woodruff & Company, and Gordon, as agent of Elgee, said at the time it had been purchased by a firm in New Orleans.

Before this seizure, to wit, March 15, 1864, Lobdell, through his duly authorized agent, VICTOR HEBERT, had executed the following contract of sale to Woodruff and Company:

"NEW ORLEANS, *March* 15, 1864.

"This contract, made this 15th day of March, 1864, be-
"tween C. S. Lobdell, of the parish of West Baton Rouge,
"in the State of Louisiana, and C. V. Woodruff & Co., of
"the city of New Orleans, witnesses: That Mr. C. S. Lob-
"dell has sold this day to C. V. Woodruff & Co. a certain
"contract, of which he is the owner and possessor, for the
"delivery of two thousand one hundred bales of cotton sold
"to the said Lobdell by Elgee and Chambers, by their
"agent, C. W. Gordon, of the county of Wilkinson, in the
"State of Mississippi, as will appear by reference to said
"contract; and the said C. V. Woodruff & Co., of New
"Orleans, aforesaid, hereby agree to pay to Mr. C. W.
"Gordon, the agent of Messrs. Elgee and Chambers, at the
"the time of receiving said cotton, the sum of one hundred
"thousand dollars, or ten cents per pound, currency; and,
"in case of not being able, from any cause, to pay said
"Gordon, then said C. V. Woodruff & Co. agree to pay
"said sum of one hundred thousand dollars, or ten cents
"per pound, to Mr. Victor Hebert, of No. 47 Common
"street, New Orleans, for account of said Elgee and Cham-
"bers, and also to pay over to said Hebert the further sum
"of two hundred thousand dollars, or the sum of twenty
"cents per pound, currency, for account of the said C. S.
"Lobdell; and in case the quantity of cotton should fall
"short, then there shall be paid ten cents per pound for
"account of said Elgee and Chambers, and twenty cents
"per pound for account of said C. S. Lobdell, for such
"amount or quantity of cotton as shall be received from
"said Elgee and Chambers; and it is understood by both
"of these contracting parties that this cotton belongs to
"Mr. Lobdell until the consideration of thirty cents per
"pound upon the cotton shall be paid, viz: Ten cents per
"pound to or for account of Elgee and Chambers, and
"twenty cents to or for account of said Lobdell, as afore-
"said.

"V. HEBERT,
"*For C. S. Lobdell.*
"C. V. WOODRUFF & CO."

This contract, executed by the duly authorized agent of

Lobdell, *Victor Hebert*, was confirmed by an endorsement on the first contract, in the words following:

"I hereby transfer all my right, title, and interest to the "within contract to Messrs. Woodruff, of the city of New "Orleans.

"C. S. LOBDELL.

"MAY 3, 1864."

And also by an endorsement in the words following on the second contract:

"I hereby transfer all my right, title, and interest to the "within contract to Messrs. Woodruff & Co., of the city "of New Orleans.

"C. S. LOBDELL.

"MAY 3, 1864."

Record, p. 37.

And that Lobdell had authorized Woodruff & Co., to prosecute this suit for his benefit. (Record, p. 24, fol. 43.)

It is further found that at the time HEBERT signed this contract and LOBDELL made these assignments, LOBDELL and WOODRUFF and COMPANY were citizens and residents in the city of New Orleans, then loyal territory, and that at the time of making the contract of March 15, 1864, the cotton remained in the custody of MORRIS, who was informed of the sale by LOBDELL to WOODRUFF and Company, and continued his custody thereof. The facts do not find that after each of these contracts was made that either Elgee or Chambers demanded any action to be taken in regard to this cotton or payment therefor by Lobdell, or that Lobdell demanded any such action or payment therefor of Woodruff and Company.

THE QUESTION IS, UNDER THIS STATE OF FACTS, IN WHOM IS THE OWNERSHIP OF SAID COTTON PROPERTY, AND "THE RIGHT TO THE PROCEEDS THEREOF,"

WITHIN THE MEANING OF THE 3D SECTION OF THE ACT OF MARCH 12, 1863, RELATING TO CAPTURED AND ABANDONED PROPERTY, OF WHICH THE CLAIMANT MUST MAKE PROOF TO THE "SATISFACTION OF THE "COURT OF CLAIMS?"

1. WERE THE PARTIES COMPETENT TO CONTRACT?

That must depend upon public laws or the statutes of the United States.

At the time the first contract was made the cotton was in disloyal territory, without the "lines of the territorial "war, bounded by the bayonets of the Union armies." Therefore, the parties might make a contract concerning the *res* without contravening the commercial intercourse acts or public law, because parties residing in enemy territory may contract together as to property which is enemy property from its *situs* in the same territory.

This has been more than once decided by this court, nor has any authority been cited to the contrary.

In the case of the second contract between Lobdell and Woodruff both were citizens and residents in New Orleans, then loyal territory, and their dealings with regard to the cotton, if it was in enemy territory, were not obnoxious to the commercial intercourse acts, nor was it so if at that time Wilkinson county, wherein was the *res*, had by the advance of the Union armies become included in the Federal lines. In neither case was there trading "across the lines." It is believed that such is the scope of the decision in Montgomery's case.

15 Wallace, 395–401.

Certainly that decision is in point if the court hold that the contract of March 15, 1864, was executory only, conveying *a chose in action* only, and not the property.

2. If, then, the parties were competent to contract in re-

gard to the property, the validity and effect of that contract must be determined by the law which governs the person of the owner with respect to the disposition of it; that is, "the "laws of the owner's domicil should in all cases determine "the validity of every transfer, alienation, or disposition "made by the owners, whether it be *inter vivos*, or be *post* "*mortem*."

Story's Conflict of Laws, sec. 383, *et seq.*

The domicil of both buyer and seller, Elgee and Lobdell, is found to have been in Louisiana, and therefore their acts are to be tested by the laws of that State.

3. *Did the contract between Elgee and Lobdell, and the acts done in pursuance of it, pass the title in the cotton to Lobdell according to the laws of Louisiana?*

This question must be determined by her code and the adjudications as to its interpretation by its highest court, which are to be respected and enforced as law by this court.

By the 2414th, 2431st, 2433d–2434th articles of the civil code it is provided as follows:

"Art. 2414. The contract of sale is an agreement by "which one gives a thing for a price in current money, "and the other gives the price in order to have the thing "itself. Three circumstances concur to the perfection of "the contract, to wit: the thing sold, the price, and the "consent.

"Art. 2431. The sale is considered to be perfect be-"tween the parties, and the property is of right acquired "to the purchaser with regard to the seller as soon as "there exists an agreement for the object and for the price "thereof, although the object has not yet been delivered, "nor the payment made.

"Art. 2433. When goods, *produce*, or other objects are "not sold in a lump, but by weight, by tale, or by meas-"sure, the sale is not perfect *inasmuch* as the things so

" sold are *at the risk of the seller* until they are *weighed*,
" *counted, and measured;* but the buyer may *require either*
" *the delivery of them or damages*, if any be, for the same,
" in case of *non-execution of the contract.*

" Article 2434. If, on the contrary, the goods, *produce*,
" or other objects have been sold in a *lump*, the sale is
" perfect, though these objects may not have been *weighed*,
" *counted, or measured.*"

It will be observed that this is the rule *inter partes*. By articles 2417 and 2442 provisions are made where the rights of third parties intervene. And these articles have been interpreted in—

Copley *v.* Daniell, 1 Robinson, 26.
Slocomb *v.* Bank of Arkansas, 2 Robinson, 92.
Cook *v.* West, 3 Robinson, 331.
Adams, Executor, *v.* Mylne, 11 Robinson, 349.

In case at bar there are no intervening rights of third parties, the United States holding simply as trustee for the party that has "the right to the proceeds."

By article 2433 the sale is complete when the merchandise is to be measured or weighed, in everything, until the weight is determined, except that it is at the risk of the seller; but it is competent for the buyer in the contract to take that risk upon himself from the date of the purchase, and thus to make the sale complete in all its parts.

This was decided in—

Kilham *v.* Carroll, 20 Annual Lou. R., 111—

which is a case that stands on "all fours," in every essential particular, with the case at bar, in which the contract declares that the cotton is "at the risk of Mr. Lobdell from this date."

By article 2434 of Code, in cases of sale of "produce in a lump," sale is complete without weighing or measur-

ing, and in case of a sale by parcels the intent of the parties as expressed in the contract must govern.

By the contract under consideration, the object, "our crops"—*i. e.*, the entire produce of our plantations for a year, *in solido*—is agreed for; the price, "ten cents per pound, currency," stated; the proximate amount, twenty-one hundred bales, "said to have weighed an average of 500 pounds when baled," arrived at; the receipt of the earnest money, thirty dollars, "to confirm this contract," acknowledged; an agreement that the purchaser should furnish at his own cost the material necessary to bale the unginned cotton is made; the time at which it is to be paid for determined upon; the amount then to be fixed by the weight, the risk in the seller from date stipulated for; the commercial house who shall receive and ship the same named, and the place where it shall be received for the purpose of being weighed determined, and an agreement that the cotton shall be "delivered," *i. e.*, "transported" at the landing at Fort Adams, a post-office in the State of Mississippi, on the river, duly established by the laws of the United States, in Wilkinson county, of which post-office the court will take judicial note, if important.

Is not every requirement of the code, and every manifestation of the intent of the parties that the property shall pass, found in this contract; specially when case finds the additional fact that the property was put in possession of the purchaser? By article 2453 of the code, "the tradition "or delivery of movable effects takes place * * * "even by the bare consent of the parties, if the things can- "not be transported at the time of sale."

But it is objected that this contract was executory, and did not pass the property because the words "to be deliv- "ered at Fort Adams" show that within the intent of the parties no delivery had been made, although the facts find

that the possession was transferred on the spot by Gordon, the agent of Elgee, to Morris, the agent of Lobdell.

Record, p. 27.

The words "to be delivered at Fort Adams" constitute an agreement that Elgee will deliver the cotton at that place, and that agreement being for work to be performed in Wilkinson county, Mississippi, must be construed and its effect determined by the laws of that State. The meaning of that provision has received judicial construction in McKay *v.* Hamblin, (40 Miss. R., 472,) which decides "that a sale is complete when the purchase money is paid "and the property is placed in the possession or under the "control of the purchaser and out of the actual possession "of the seller, notwithstanding an agreement on the part "of the latter to *deliver the property at a certain place* "when requested by the vendee. In such case the agree-"ment to deliver will be construed to mean *an agreement* "*to transport merely*, and the vendor will not be liable for "the loss of the property after sale and before transpor-"tation."

It will be observed that in our contract the phrase is to be delivered *at* the landing of Fort Adams—not delivered *to* anybody there.

It is also objected that, the weighing of the cotton remaining to be done, the property did not pass to the vendee, and numerous authorities at common law have been cited establishing the familiar principle that where the counting, weighing, or measuring of property sold in parcels remains to be done, the property does not pass to the vendee, but remains at the risk of the vendor.

To this objection two answers may be made. First, as we have seen, this contract of sale is not to be construed according to the rules of the common law, as modified by

the statute of frauds of Charles II, but according to the rules of the civil code.

Attention should be called to another point, that article of the code No. 2470 provides, among other things, that the purchaser can "claim no diminution of the price on a "deficiency of the measure, unless the real measure comes "short of that expressed in the contract by one-twentieth "part, regard being had to the totality of the object sold, "provided there be no stipulation to the contrary."

The parties here were Louisiana planters, contracting according to the laws of Louisiana, with which they were familiar, it being probably such a contract as was made every year by them. "Paid for when weighed" is the "stipula- "tion to the contrary" to prevent the operation of the five per cent., or "one-twentieth part" rule of the code.

The common law rules have always been invoked to determine at whose risk is the property, in case of loss, while it is being counted, measured, and weighed; but it has never been held that, where a contract of sale of an entirety has been made by a memorandum in writing, the price agreed upon, and the purchaser put in constructive or actual possession, the property did not pass so as to give the immediate right of possession to the purchaser, so that he could maintain either trover or replevin as against a wrong-doer; and this court has decided that a title, sufficient to maintain trover or replevin by the purchaser, is such ownership as is contemplated by the act of March 3, 1863.

Carroll *v.* The United States, 13 Wallace, 151–153.

We should, however, reach the same result by the common law.

The common law rule as laid down in Gilmore *v.* Sapple, (11 Moore P. C., 566, 1858,) is now expressed as follows:

"By the law of England, by contract for the sale of spe-
" cific ascertained goods, the property immediately vests in
" the buyer and the right would be in the seller, unless it
" can be shown that such was not the intention of the
" parties."

And in the Calcutta Company *v.* De Multas, (32 L. P., 2 B., 222, 228,) Blackman, J., pronounces this "to be a very accurate statement of the law."

Benjamin on Sales, 220.

So is the law of this country.

The American rule is well stated in Crofut *v.* Bennet, (2 Comstock N. Y. Rep., 258 :)

" If the goods sold are clearly identified, then, although
" it may be necessary to number, weigh, or measure them
" in order to ascertain what would be the price of the whole
" when agreed upon between the parties, the title would
" pass. If a flock of sheep is sold at so much a head, and
" it is agreed that they shall be counted after the sale in
" order to determine the entire price of the whole, the sale
" is valid and complete. * * * The distinction in all
" these cases does not depend so much upon what is to be
" done as *upon the object which is to be done.* If that is
" specification, the property is not changed. If it is merely
" to ascertain the total value at designated rates, the
" change of title is effected."

Indeed the provision of the code (article 2433) formulate this proposition by declaring that the sale is complete, except that the property is at the risk of the seller, unless it is assumed by the buyer as a part of the contract, which the courts of Louisiana have held in Kilham *v.* Carroll, *ubi supra*, it is competent for the purchaser to do, and thus perfect the sale.

If the court should hold that the property having its *situs* in Mississippi, the effect and validity of the contract are to be determined by the laws of that State, it is submitted that we shall reach the same result.

The 4th section of the Code of that State, in 1857, p. 59, Article 4, Chap. 44:

"No contract for the sale of * * personal property "* * * for the price of fifty dollars or upwards shall "be allowed to be good and valid except the buyer re- "ceive * * * part of the personal property, * * * "or shall actually pay or secure the purchase-money or a "part thereof, or unless some note or memorandum in "writing of the bargain be made and signed by the party "to be charged by such contract, on his part thereunto "lawfully authorized."

McKay *v.* Hamblin, *ubi supra.*
Jordan *v.* Harris, 31 Miss., 257.

In this case, very like in its leading features to the case at bar, such a transaction was held to pass the property, even as against an attaching creditor, the court holding the same to be good at common law, and the statute of Charles II, chap. 17, sec. 3, had never been adopted in Mississippi as part of the common law of the State there, but the common law was in force there as before the statute of frauds.

If we are correct that the property passed to Lobdell by the contract of sale from Elgee, and this is admitted in the brief of the Attorney-General of the Government, (Brief, p. 8,) then petitioners, Woodruff & Co., might rest here without considering at all the subsequent contract of March 15, 1864, between Lobdell and Woodruff & Co., because the facts find explicity that Woodruff & Co. were authorized by Lobdell to prosecute this suit for his benefit; and it appears that the contract of sale and all rights

under it were, by the endorsements of May 3, assigned by Lobdell to Woodruff & Co.; and the Court of Claims have protected the rights of Lobdell in their judgment, who was a suitor at the same time (case No. 3203, Rec., pp. 15–18) for this same cotton before the court, and by an agreement of all parties in interest in open court his rights were determined in the same judgment with those of Woodruff & Co.

The rights of assignees against the United States have always been protected in the Court of Claims.

See Tebbet's case, 5 Court of Claims, 607.
Silverhill's case, *Ibid*, 610.
Crowell's case, 6 C. C. R., 23.
Burns' case, 7 C. C. R., 219.
Cavender's case, 8 C. C. R., 281.

Indeed, it was in the first establishment of the Court of Claims, (vol. 10, Statutes-at-Large, 612,) it is made the duty of the claimants in that court in all cases to set forth a full statement of the claim, specifying what person or persons are owner or owners thereof or interested therein, and when and upon what consideration such person or persons became so interested.

Indeed, in this very case the executrix of Elgee is prosecuting this suit here in this court; and what is she but an assignee of the claim by operation of law and the act of the testator?

AS TO THE CONTRACT BETWEEN LOBDELL AND WOODRUFF OF THE 15TH MARCH, 1864.

We do not contend that that contract is not an executory one. It clearly contemplates the property remaining in the possession of Lobdell, but the contract gives an immediate right of possession of the cotton to Woodruff &

Co., and enables them to call upon Lobdell at any moment for a specific performance of that contract.

Article 1920 of the civil code is as follows:

"On the breach of *any* obligation to do or not to do, the "obligee is entitled either to damages, or, in cases which "permit it, to a specific performance of the contract, at his "option."

So it will be seen in article 2433, heretofore quoted, page 2, "either the delivery of them, [*i. e.*, the goods not "sold in a lump, but by weight, &c.,] or damages if any "be for the same in case of non-execution of a contract."

It would seem, therefore, quite certain that the cotton was at Lobdell's risk, under all chances, to be delivered to Woodruff & Co. upon demand, and that therefore Woodruff & Co. were entitled to a specific performance of this executory contract, and entitled to follow the proceeds thereof, the right to which they had bought, wherever it might be found, as against Lobdell, the seller, and thus, in the language of the act of March 12, "satisfy the Court of "Claims that they had a right to the proceeds."

Indeed, this court in Carroll *v.* The United States have recognized this distinction between the "ownership" of the property and the "right to the proceeds," and that the two are separable. The words are these:

"It is plain to us that the *ownership* to be proved was "that which existed at the time of capture or abandonment, "and that the *right to the proceeds* was that which existed "at the time of the petition filed in the Court of Claims. "These titles, in their nature *capable of separation*, co-"existed in the petitioner."

Is not ours exactly the case presupposed by the court? The "*ownership*" at the time of the capture was in Lobdell; "the right to the proceeds" now in Woodruff & Co.

The whole theory upon which the court has dealt with captured and abandoned property is, that the United States hold it as trustees for those having the right to the proceeds, as *cestui que trusts*, and this phrase, "the right to the proceeds," is put in the statute as contradistinguished to ownership, the proof to be made of that to the "satis- "faction of the Court of Claims," as has been done in this case.

It is difficult to see why Woodruff & Co. are not entitled to the proceeds of this cotton, at least to the extent to which they have been awarded to them in the Court of Claims, especially as the case finds they are carrying on this suit for the benefit of, as well as, in the name of Lobdell, the adjudicated owner of the cotton, to the "satisfaction of the Court of Claims."

APPELLANTS DO NOT APPEAL FROM CONCLUSIONS OF LAW, BUT FOR ERRORS OF APPORTIONMENT OF PROCEEDS.

Recognizing the propriety of the judgment and conclusions of law arrived at by the court below, these appellants do not seek to have them reversed, but have brought up this their appeal in order to have the allowance of interest and the apportionment of the fund corrected by principles which we will state hereafter.

But before so doing it becomes necessary to submit some observations upon the objections taken by the co-claimants in behalf of the succession of NUTT and ELGEE, and upon the single objection made by the UNITED STATES to the validity of the judgment.

THE CLAIM OF THE SUCCESSION OF HALLER NUTT.

Julia A. Nutt, executrix, filed her petition on the 19th August, 1868, (Record, p. 4,) and prosecuted her claim to final judgment, which was entered against her May 8,

1872, (Record, p. 19 ;) filed her claim for appeal on the 6th August, 1872, (Record, p. 21,) and filed her appeal in this court October 16, 1873.

This case is easily disposed of.

It was made in the Court of Claims on the last day possible, the two years' limitation expiring on the 20th August, 1868, (*if not too late,*) *and her appeal from the judgment of such court taken on the last day possible, the ninety days' limit expiring on that day, and after delay of entry of that appeal for more than fourteen months past the term when it could be entered except by special motion in this court, and no special motion appears on the record to have been made,* the appellant now comes in court and in an elaborate brief claims to assign error in the proceedings as to others in the court below, in which she could have no possible interest, as those proceedings are not applicable to her own case.

The fact is found (Record, p. 22) that her husband resided within the military lines and control of the Union forces, and obtained a permit for Holmes, his agent, to pass out of said lines on this business to Alexandria, then within the lines of the enemy, and negotiated for the cotton in controversy. The correctness of this finding is admitted by Mrs. Nutt in her brief, (pp. 3 and 4,) wherein this is stated.

The invalidity of this transaction, as found by the Court of Claims, has been so often decided by this court that in the case United States *v.* Lepine and Ferree, (17 Wallace, 601,) the court say: "That the principle is now too well "settled to justify discussion." This rightly made decision of the Court of Claims against her pretensions, therefore, sent Mrs. Nutt out of court; and upon what standing does she now come here on the last day in which she could come from that court, and, after more than a year's

delay, set up errors in the record of the proceedings of the court as to other parties, in distribution of the proceeds of this cotton, in which she could have and has no possible interest? It is true that her counsel signs his brief as the "counsel for Elgee's and Nutt's estates," but as the claims of the two estates are diametrically opposed to each other, it would seem to be difficult to reconcile his opposing duties. But with that we have nothing to do save to object that there ought not to be two separate and conflicting successions to the same estate heard in this court; and Wells, the administrator for whom the counsel of Mrs. Nutt claims to appear, has not been admitted here to prosecute or defend.

THE ARGUMENT IN BEHALF OF THE UNITED STATES.

The brief of the learned Attorney-General (p. 8) admits that the property in this cotton passed into Lobdell by the contract of July 31, 1863, as we have before herein claimed, it being the sale of a specific lot of cotton, to wit, "the crops," and in that we agree. Both rely upon the clear and learned argument rendered in this case by the Court of Claims, for which see—

7 Court of Claims Reports, 605.

This, then, ends all interest of the United States in the proceeds of this cotton, and it is respectfully submitted that it is not competent for the United States to assign error in the action of the court below in the decision consented to by Lobdell and Woodruff for their own purposes of the proceeds of cotton to which the United States admits Lobdell was entitled.

The case finds that "Woodruff & Company were authorized by Lobdell to prosecute this suit for his benefit, and Woodruff & Company agreed IN OPEN COURT by their

counsel that the court should apportion the fund in suit "among the parties found to be equitably interested "therein."

Record, p. 24.

Now, whatever errors may have been found as to the propriety of that apportionment, the United States are not injured by it, and cannot assign error therefor.

The only assignment of error on the part of the United States that need be noticed is, that Lobdell was no party to any petition in the Court of Claims at the time when the judgment was rendered.

This assignment of error is founded on a mistake of fact. It appears by the Record that Lobdell filed his petition in time, and it stood No. 3203 on the docket of that court, and that the two cases of Woodruff and Lobdell, claiming though the same title in community of interest, were consolidated, (Record, p. 16,) and that this "consolidated case" was ordered to be proceeded with by the order of the court on the 23d of March, 1870, and thereafter was treated as one case, and as such they are recited in the final judgment as being one and the same case.

Record, p. 18.

The same consideration, also, will meet the suggestion of the learned counsel of the Government, that the whole title of Woodruff and Lobdell was not set forth before the Court of Claims. In the petitions of both, all the facts were disclosed; but further, this objection was not taken in the court below, where it could have been easily obviated by an amendment, as, indeed, it was obviated, if it ever existed, by the consolidation of the two cases.

But it appears so clear to us that no judgment could be finally rendered in favor of the United States for the pro-

ceeds of this cotton as against Lobdell, that it will not be profitable to pursue these considerations further.

THE CLAIM OF THE SUCCESSION OF ELGEE.

We object, *in limine*, that the executrix of Elgee has no standing in this court. In this we unite with the Government. (See Attorney-General's brief, pp. 5–6.) It is true that Mrs. Ganssen, together with Mary Ann Wells and other grandchildren of Elgee, brought their petition in the Court of Claims in time; but it is also clear that they, as derivative heirs of the estate of Elgee, had no right so to do, or to intermeddle, or to interfere with, the personal property or *choses in action* belonging to that estate. This is so well settled at common law, that the learned counsel of the executrix substantially admits it in his brief, (p. 14,) wherein he claims "that the heirs, under the civil code, "represent the succession, unless and until the executor "or administrator intervenes." But, for this, cites no authority. Is this so?

The facts as set forth in the petition of Mary Ann Wells *et al.* were that *Elgee died on or about the 14th October*, 1864, at New Orleans, leaving a widow and two children, (Record, p. 31;) the wife and one of the latter died before the filing of the petition, and that no administration had been taken on his estate in Louisiana up to the date of filing said petition, except that, as the records of this court show, Miles Sells, as administrator of his estate, appeared in this court to prosecute a case for the very proceeds of this cotton.

In the petition of Mary Ann Wells *et al.* (Record, p. 33) it is averred that "no assignment or transfer of said claim, "or any part thereof or any interest therein, has been made, "except as in said petition is set forth."

See Docket of this Court, Dec. Term, 1867.

Therefore, upon these facts, as they appear of record, Elgee's was a "vacant succession" for several years; and the Record shows that Bessie Elgee Gaussen was a married woman, resident in Ireland in April, 1867, (Record, p. 34,) where she now is. Under these circumstances it is clear that so far as there was any administration in Louisiana, the succession of Elgee was what is known to the civil law as a "vacant succession." By whom are vacant successions managed? The code, article 1090, says:

"Vacant successions are managed by the administra-
" tors appointed by the courts, under the name of curators
" of vacant successions."

Article 1146 provides who shall bring suits, as follows:

"The curators of vacant successions and of absent heirs
" act in their names and quality in all contracts or other
" proceedings in which the succession or the heirs which
" they represent are interested, and appear in all suits in
" which they are obliged to act in that capacity either as
" plaintiffs or as defendants."

Again, Bessie Elgee Gaussen moves to appear in these cases as dative testamentary executrix of the last will and testament of John K. Elgee. (Record, p. 12.) Under what circumstances may a "dative testamentary executrix," be appointed? The code, article 1671, provides as follows:

"If the testator has omitted to name a testamentary ex-
" ecutor, or if the one named refuses to accept, the judge
" shall appoint one *ex officio*."

Where, then, is the authority under the civil code for the heirs to promote this petition? Certainly none is shown by the brief.

Then the case stands thus:

Certain heirs, who could have no title to personal property and no standing in the court as such, without right bring a petition, within the two years limited by law in which the court can have jurisdiction. After the two years have expired, the dative testamentary executrix proposes to come in and prosecute a suit as a new party, by way of amendment. Can this be permitted?

It is said that this objection, not being taken in the court below, is not open here. That might be true, had not this court decided that this limitation is a fact essential to the jurisdiction, and, therefore, cannot be waived.

Appearing on the face of the record it need not be pleaded, and may be taken at any time.

It is familiar law that an objection which raises the question of jurisdiction, apparent on the record, may always be taken in the original or appellate court, for the reason that the objection cannot be cured by amendment.

We submit that this point has been in fact decided by this court in Innerarity's case, (19 Wallace, 595.) *See also cases cited in brief filed by the appellant in opposition to the motion for new findings.* See also case of Cowan's heirs, (5 Court of Claims Rec., p. 16,) where it is decided that such an amendment cannot be made, unless it shall be affirmatively shown that no new rights, such as creditors and others, to the property in question, intervene.

Thus far, as the appellants deem themselves legally bound to do, we have argued our objection to the amendment admitting Bessie Elgee Gaussen, dative testamentary executrix, as a party to the record, believing that Elgee's succession was indeed "vacant" at the time of filing the petition of Mary Ann Wells *et al.*, and in that belief we were fortified and made certain by the statements in her brief in that behalf, which appear on the 14th page, (brief of executrix,) in the words following:

"This action was properly brought in the first instance. "Heirs under the civil code represent the succession *unless* "or UNTIL an executor or administrator intervenes."

And again, on page 15:

"The change was merely *nominal*, conferring the right "to continue the prosecution of the action by the plaintiff "in her quality of executrix instead of that of heir, an offi- "cial status which *meantime*, by operation of law, she had "acquired."

But what are the rights of the executrix if the statements of her position as set forth in the Record are entirely untrue in point of fact, and the facts concerning it have been up to this moment concealed from the court?

We are bound to presume that the counsel, when he claims in his brief that the action was rightly brought in the first instance by the heirs on the last day but three in which they could bring it, because the succession was "*vacant*," and that "meantime the administration had been cast upon "Gaussen," believed the facts so to be, and indeed the Record tended to show so they were.

But the court will do us the favor to remember that early in the present term of this court, Mr. THOMAS J. DURANT, a counsellor of this court, filed a motion for leave to appear in behalf of E. T. Parker, of New Orleans, to be substituted in these several petitions to prosecute instead of Bessie Elgee Gaussen, executrix of the estate of Elgee.

In answer to this motion, Carlisle & McPherson, her counsel, filed a brief, which is herewith presented, the 17th page of which recites:

"Mr. Parker, by his counsel, has filed in support of the "motion a fragmentary transcript of the proceedings of "the probate court. We now exhibit in court a complete "and authentic transcript of the whole proceedings of that "court down to the present time."

Turning to page 11 of the brief and exhibits, we find the appointment of Bessie Elgee Gaussen as dative testamentary executrix of the last will of J. K. Elgee, and that she fulfilled all the requisites of the law, dated the 13th day of December, 1864, seven years prior to her appearance in the Court of Claims, praying leave to appear in that court as such executrix, to wit, the 8th day of December, 1871, and more than three years before she joined in the petition of Mary Ann Wells *et al.* as tutrix of her children, and in her own right as heir, to wit, March 30, 1868.

Turning to page 19 of said brief we find a copy of the "provisional tableau" of that estate filed December 11, 1865, or, as it is called on page 20, the "provisional account" of the administratrix, which is ordered "to be now "approved and homologated, and that said dative testamentary executrix be ordered to pay and distribute inaccordance therewith," and judgment signed therefor on the 3d of January, 1866; and we further find that on motion of the counsel for the executrix, and with the suggestion "that "the tableau herein filed is not a final tableau, and that "the condition of the estate is such as to admit of the "filing of a final tableau, which it is proposed to file in "lieu of said tableau filed, it is now ordered that said "executrix be allowed to withdraw said tableau filed, in "order to file said final account."

And on the 21st page of said exhibit we find the final account presented by the executrix, and on the 23d page we find that "it was ordered, adjudged, and decreed that "the opposition of Jane Y. Kelso be dismissed, that Philip "Donohue be placed in the tableau for $200, and as thus "amended that the tableau be approved and homologated, "and the funds distributed accordingly." And the judgment in this behalf was signed June 3, 1870, and no further proceedings whatever were taken in this estate by said dative testamentary executrix.

But it nowhere appears, either among the assets or property of the estate, in said provisional account or among the assets of said final account, that any claim was made or stated by or in behalf of the executrix for the proceeds of the cotton which is now the subject of this petition, or that any heir or other person had any right or title thereto, or that Elgee ever had any right, title, or interest therein during his lifetime, or his estate after his death, upon this claimed property, and as to the accounting "for a half mil-"lion dollars belonging to the estate," as her brief claims, the probate proceedings of that estate and any statement thereof at the hands of the administratrix thereof are wholly silent, and this "exhibit is certified to be the full "and true transcript of the whole proceedings in the pro-"bate court."

But we do find in said account (Exhibit, p. 23) that D. D. Withers, by the "effect of the compromise made between "said Withers and said Mrs. Gaussen, executrix, and the "parties in interest, is placed upon the tableau as a credi-"tor for and entitled to the rest and residue of the entire "assets of this succession after paying the claims herein-"before set forth."

Turning, then, to the record of the Court of Claims (p. 12) we find that D. D. Withers appears a year and six months afterwards as attorney for Bessie Elgee Gaussen, and prays for leave to amend the petition and have the same admitted; and "by leave of court amends the petition, "and says that she is also dative testamentary executrix "of the last will and testament of John K. Elgee, de-"ceased." And on the 8th day of December, 1871, at New York, Withers signed the foregoing amendment, and made oath, among other things:

"That he believes the facts stated therein and in the pe-

" tition in this cause to be true, and *that no assignment or* " *transfer of the said claim or of any part thereof, or any* " *interest therein*, has been made, and that the claimant is " entitled to recover the amount therein claimed from the " United States."

Record, p. 13.

Such is a statement of facts in this behalf, which are not obnoxious to the charge that we are travelling out of the record therein, because they are drawn from the brief of the petitioner, filed of record in this court in this cause.

The case upon this point, therefore, now stands thus:

Elgee died in October, 1864; Gaussen was appointed dative testamentary executrix in December, 1864. On the 30th of March, 1868, three days before the last day in which she could make the claim, she joins with Mary Ann Wells and others, heirs of said Elgee, in her own right and as natural tutrix for her minor children in a joint petition; and the petitioners make oath in that petition *at that time* " *no assignment or transfer of said claim, or any part* " *thereof or any interest therein, has been made, except as* " *in the petition stated*," wholly concealing the fact that one of the parties was at that time EXECUTRIX of said estate.

While the claim is thus being prosecuted the executrix settles her provisional and final accounts of said estate in the probate court, May 30, 1870, and transfers all the interests and rights of the succession and the estate of Elgee to D. D. Withers, "according to a compromise made between said Withers and said Bessie Gaussen, executrix, and the parties in interest, by which said D. D. Withers is placed upon the *tableau* as creditor, and entitled to the rest and residue of the entire assets of this succession by paying all claims hereinabove set forth."

The objection to this amendment now presents itself in

this form: Can a petition be brought by the HEIRS of an insolvent estate for the proceeds of cotton supposed to belong to the decedent in which they had no interest, and could have none, because the estate was wholly insolvent, concealing the fact that one of them is at that moment the EXECUTRIX and entitled to the administration of said estate within three days of the time when a petition on account of that claim could be filed, and making oath that nobody else has any interest in the claim except the petitioners, allow that claim to stand in prosecution before the Court of Claims for three years? Meanwhile, the executrix settles her account and closes the estate, transfers all possibility of claims belonging to the estate thereafter to one who claims to be creditor of the estate, and then the executrix be admitted as a party to prosecute this claim three years after the statute of limitations has run, upon the oath of the party to whom the claim has been assigned *that no one but the executrix and the heirs have any assignment of or interest in the claim*, when both the executrix and assignee know that he has bought the claim of the testatrix, and it has been transferred to him a year before he makes that oath, and then on the hearing before the Supreme Court instruct his counsel to present to the court in his brief "that the action was properly brought in the first instance," *i. e.*, in the name of the heirs, and that a change merely nominal conferring the right to continue the prosecution of the action upon the plaintiff in her quality of administratrix instead of that of heir, an official status which MEANTIME by operation of law she has acquired.

Will the Supreme Court sanction such proceedings when brought to their notice from their own records, in the prosecution of claims against the United States, especially when the counsel is instructed to use language against the parties who have diligently prosecuted what they believed to be their rights in these proceedings, like the following:

"By what juggling, then, have they, [*i. e.*, the appel-
" lants,] or some of them, obtained this property?"
(Brief of Mrs. Gaussen, p. 22.)

This condition of title and this procedure before the courts cannot be heightened by words of characterization or elucidated by argument.

But we may be pardoned if we extract another single sentence from Mrs. Gaussen's brief, (page 22,) as substantially applicable to her position:

"In the name of honesty and decency, as well as law,
" what pretence of legal claim can they set up to recover
" about half a million of dollars, the proceeds of property
" in question, on the footing of owners, for distribution
" among themselves and their confederates in the prosecu-
" tion of this claim?"
"It is a monstrous claim, having about it all the ear-
" marks and the odor of fraud."

We now advance to the propositions made on behalf of Mrs. Gaussen, by her counsel, some of which might, perhaps, be well enough in law, if they were supported by the facts found.

It will be useful, in order that the court may not be misled, to call attention to some of the errors of fact upon which her argument is founded, set forth in what is well called a "statement," because it has no foundation in the record.

To show the court how far the counsel for Mrs. Gaussen travels out of the record in the brief, (p. 7,) take the following:

"There is no weight due, therefore, to this fact in deter-
" mining the rights of Elgee and Lobdell, respectively,
" under this agreement. Indeed, *facts that have come to*
" *light since the trial below* show the statement as to the
" employment and care of Morris to be pure fiction; and,

" moreover, that the pretended sale to Lobdell is also pure " fiction.

What authority is there for this averment, made with the apparent purpose of making an insinuation to prejudice the mind of the court, upon an argument of a pure question of law depending upon facts found of record, unless, indeed, upon the uncomplimentary assumption that prejudice produced by an unfounded statement of fact can swerve the just judgment of the Supreme Court of the United States?

If it be true that such facts have come to light since the trial, why has not a motion for a new trial long since been made, as the injured party might and ought to have done?

Again we are told, (Brief, p. 23:)

" If they [*i. e.*, the successors of Elgee] ever had a right " of action against Lobdell or his assigns, or even Nutt, " who says he is a beggar, (*which is probably the state and* " *condition of all of them*,) it has long since been barred " by the statute of limitations."

Why, again, this unwarrantable attack upon the character and responsibility of these petitioners? What justification for it is there in the Record? How does it instruct the mind of the court, in a hearing of questions of law, on findings of fact? On the contrary, it does appear from the very contract itself, between Lobdell and Woodruff & Company, that that firm was considered responsible in a contract for three hundred thousand dollars, made in the usual course of business, after the Mississippi and its tributaries had been opened to commerce.

Again, supplementing this statement, and to enforce it, we are told that this is " a monstrous claim, having about " it all the ear-marks and the odor of fraud," (Brief, p. 22.) Why is this ground of defence set up first in this appellate

court when it was not raised in the court below, nor any finding of the fact found or asked to be found in the record? Why is this appellate tribunal asked to find a defence of fraud when they can only pass on the law? This, too, should have been set up in the court below, except it is an attempt to swerve the judgment of the court by appealing to prejudice once again, by an unfounded assertion of fraud, *which would and could have been instantly met in the court below if any one had the hardihood to make it where its falsity could be proven.*

Again, we are told, in italicized print, (Brief, pp. 34 & 35:)

"The alleged contract with Lobdell was made on the 31st "July, 1863. *From that day to this no communication* "*on the subject of it* APPEARS *to have been had between* "*Lobdell and the alleged vendors or their legal repre-* "*sentatives, and no act of any kind in the premises was* "*done or performed by Lobdell, (except the alleged employ-* "*ment of Morris to watch the cotton, to which, for rea-* "*sons before assigned, no effect is to be attributed,) look-* "*ing to a performance of the contract.*"

Why again this unauthorized assertion of another set of facts, asking the Supreme Court to find them not only without evidence, but directly in the face of the finding of the court below?

By turning to the Record (p. 28) it will be seen that the court below was asked by Mrs. Gaussen's counsel to add the findings of these very facts to its findings of facts, in these words:

"2. *To add that Lobdell and his assigns never fur-* "*nished any baling or twine, and never offered, really, at* "*Fort Adams, to receive the cotton.*"

Upon which prayer of the counsel for Gaussen the court made the following order:

"The findings above requested are refused *because they* "*are not supported by the evidence in the case.*"

Again, we are told (Brief, p. 33) that—

"It will not escape notice that in this case there was a "very good reason for such a stipulation, growing out of "the *ridiculously low price* at which the cotton was "agreed to be sold."

What evidence has this court of the market-price of cotton in Wilkinson county, Mississippi, on the 31st day of July, 1863, which cotton was in such condition that the court below find (Record, p. 24) that—

"At the time of making the contract between Elgee and "Chambers and Lobdell, on July 3, 1863, and until the "seizure of the 572 bales by the United States, above "stated, the removal of said 2,100 bales of cotton from "where it was stored on Buffalo Bayou without a strong "force to protect it would have subjected it to the peril of "having it destroyed by the Confederates or raiders. And "shortly after the removal of the 572 bales by the United "States, the residue of the 2,100 bales was burned by "raiders."

Does not the fact that not over one-fourth of it could be moved without losing the remainder show the almost worthlessness of the cotton in that condition? But, further, this is an unfounded statement of fact, and not an argument as to the law, which alone ought to be addressed to this court.

Again we are told, (Brief, p. 10:)

"The *commencement of the actions* of Woodruff & Com-"pany and of Nutt against the United States in 1868 is "the FIRST assertion of either of any interest in the cotton. "They probably thought it would be as well to take part

" in the general scramble and trust to luck and chance for " the result."

If the learned counsel who framed this brief had been in the case in the court below he would have learned two facts that would have forever closed his mouth against such an utterly untrue and unjustifiable an assertion: *First*, that Woodruff & Bouchard filed their original petition (a certified copy of which I hold in my hand, with an agreement on the part of the United States that it may be used in this hearing,) in the Court of Claims on the 26th of April, 1865, and a motion from the records of the same court on behalf of the United States on the 25th May of the same year that the petition be dismissed because it was filed too soon—not an objection of want of diligence, but of too great diligence, as that petition could not be filed until after the suppression of the rebellion, and it was filed at the earliest possible hour after the surrender of Lee, which the petitioner supposed to be, but which the court decided was not, the legal end of the rebellion. Counsel were misled by not observing the fact that the petition of ~~April~~ January, 1868, was an amended petition by leave of court, as appears by the record, (p. 1,) which amended petition sets forth the fact that Woodruff & Co., within *seventeen days* after their purchase, to wit, on the 3d day of April, 1864, had " applied to R. S. Hart, special Treasury agent at Natchez, " for a permit to move said cotton," in order that they might receive the cotton and transport the same to New Orleans, and that the Treasury agent granted such permit, and the petitioners have " given bonds and complied in all " respects with the regulations of the Treasury Depart- " ment in such cases made and provided;" and that in the same month of April, B. F. Camp, claiming to act as agent, came to Wilkinson county and seized the same cotton, and carried it to Natchez and delivered it to the same

Treasury agent, while Woodruff & Company were *in viam* to get the cotton purchased by them; thus making it evident that Hart took advantage of the knowledge which he received from Woodruff & Company to make the seizure before they could get to their property.

Did the proprieties of the occasion permit a discussion of the facts, we would call the attention of the court, and do take leave to call the attention of the counsel, that the facts find that Elgee, by his agent, was on the ground at Natchez with the seized cotton, and Elgee followed the cotton to St. Louis, and suggest that it would not be a far-fetched inference to suppose that this seizure was made by Elgee's direction, in order to break his contract with Lobdell. Whenever such a fact becomes material as a fact in the cause, we shall be glad to meet that issue.

Second. It might well have estopped the counsel on the question of want of diligence if he had remembered that the succession of Elgee, by his heirs, whose counsel is now complaining of want of diligence on the part of Woodruff & Company, did not file their original petition until the 30th of March, 1868, which was within three days of the last day when the two years expired after the suppression of the rebellion in Louisiana, to wit, April 2, 1866, as decided by this court in the *Protector*, (12 Wallace, 700.)

Upon this showing, taken from the Record, in whom was want of diligence? Who came last into the "general "scramble;" Woodruff, who filed his petition April 26, 1865, *too soon*, or Elgee's heirs, who filed their petition, "*with the half-dozen others*," three years afterwards, *almost too late?*

Yet a grave legal argument, with a citation of authorities, may be found on the 34th page of his Brief, and addressed to this court, to find that Lobdell's contract was abandoned, upon the proposition of fact that from the 31st

day of July no communication on the subject of it "ap-
" pears to have been had between Lobdell and the alleged
" vendors or their legal representatives, and no act of any
" kind in the premises was done or performed by Lobdell
" (excepting the alleged employment of Morris to watch
" the cotton, to which, for the reasons before assigned, no
" effect is to be attributed) looking to a performance of the
" contract;" the argument concluding in these words:

"In the case at bar the facts showing an abandonment
" are of the most decisive character."

There are many answers to this. One of the vendors, Chambers, is found to have abandoned all interest in the cotton before its capture by the United States; at what time does not appear. Second, whether Lobdell did any acts, and what, toward performing his part of the contract, does not appear; and as we have seen, (Record, p. 28,) the court refused the prayer of Elgee's succession to find that Lobdell and his assigns "never furnished any baling or twine;
" and never offered, really, at Fort Adams, to receive the
" cotton, because such findings are not supported by the
" evidence in the case." Third, it is shown by the Record, and admitted, that Elgee died while pursuing his fruitless suit in St. Louis, in October, 1864, and that there were no known legal representatives of Elgee with whom Lobdell could "*communicate*" until four years and a half after his assignees had filed their suit in the Court of Claims for this cotton, to wit, December, 1869, and the "dative testament-
" ary executrix," just then appointed, lived in Ireland, and has lived there ever since, (Record, p. 34,) and the affidavit of the counsel for Elgee's succession, Mr. McPherson, has been filed in this court on a motion declaring that the succession of Elgee was utterly insolvent, and the suit by the administratrix is prosecuted by one Withers, who seems in

some way to have bought into the claim. Upon what meat, then, does the counsel for Elgee's succession feed that he should talk of "*beggars* and *adventurers*" when speaking of the parties in this suit?

Attention is further called to the fact that this defence of abandonment was not set up in the court below, or if set up it was in the judgment of the court not found as a fact and not supported by the evidence. Certain it is the counsel of Gaussen asked for no finding in relation to it.

But the counsel of Elgee, not content with bringing in facts *dehors* the record to obtain the judgment of the court upon them without evidence, distinctly contradicts the record itself, and misstates the facts found by the record by mistake we are bound to believe; but when such gross mistakes of facts in a special finding are made by the counsel, how far can his argument upon the law applicable to them instruct the court?

SOME OF THESE MISTAKES OF THE RECORD FACTS FOUND IN THE BRIEF ARE AS FOLLOWS:

The brief states (p. 6) that at the date of the agreement of March 15, 1864, the record shows that it was made "across the lines," between Lobdell, a resident of West Baton Rouge, within the lines of the Confederate army, in hostile territory of a rebellious State, within which the cotton also was, and Woodruff and Bouchard received the assignment within the lines of the Union army, on territory that had been restored to the jurisdiction of the Federal Government. This statement is again repeated on page 30 of the Brief, in the following words:

"At the time of the assignment to Woodruff & Co., by "Hebert, acting as Lobdell's agent, March 15, 1864, "Woodruff & Co. and Hebert were residents of New Or-

" leans, which place then was, and for some time thereto-
" fore had been, in possession of the Union forces."

"At the time, to wit, March 15, 1864, both Lobdell and
" the cotton remained within the rebel lines, exactly where
" they were on the 31st of July previous, and this ap-
" pears by the express terms of the contract under which
" title is claimed."

Now, the Record (pp. 22, 23) states the finding of the court to be exactly opposite:

"On the 15th day of March, 1864, C. V. Woodruff &
" Co. and the said C. S. Lobdell, by his duly-authorized
" agent, V. Hebert, made the contract, a copy of which is
" hereto annexed, and marked B.

"At the time of making this contract *Lobdell and*
" *Woodruff and Bouchard were* CITIZENS *of and* RESIDENTS
" *in the city of New Orleans, then loyal territory.*"

And yet, upon this misapprehension of the facts found by the record, an argument of three pages is made in the brief, accompanied by EIGHT *citations of authority*, to show that this contract was void and in violation of the non-intercourse acts, because made by residents and citizens of loyal territory with a party resident and citizen of disloyal territory.

THE CONTRACT AND ACTS OF THE PARTIES ARE ALL CONSISTENT WITH EACH OTHER.

Without further pursuing these assumptions of facts not found and misapprehensions of the facts found in the Record, and in answer to all that may be stated as to the conduct of these parties toward each other and toward the *res*, all the acts of the parties can be well explained when the facts found by the Record are considered.

The cotton, on the 31st of July, 1863, lay in an exposed

condition, not to be moved without danger of being burnt, and therefore not worth to the seller "ten cents a pound." It was bought as a crop, with all imperfections, the buyer taking all the risks for that price, to be transported by the seller to Fort Adams when it could be safely and legally done, after the advance of the Union armies, then expected by the buyer. All further proceedings must by law wait that event. Both parties contracted with a view thereto, and the payment was not to be made or called for until the transportation by the seller to Fort Adams should take place; so that it was not a cash sale, but a sale with deferred payment, an earnest being paid to complete the contract of sale. By the advance of the Union armies, in 1864, the march in the spring of that year of General Banks up the Red River to meet the only rebel army left in that vicinity, its safety was so far assured, in the judgment of its owner and those desiring to purchase, that the price trebled, and it was sold for thirty cents the pound. Meanwhile, Elgee, in October, 1863, being himself within the rebel lines, and the cotton within the rebel lines, and knowing that Lobdell could not then ship it at New Orleans, as he had agreed to do when it could lawfully be done, made an arrangement with Holmes, at his solicitation, that he should ship it to Liverpool, probably through some blockade-runner, for fifteen pounds sterling per bale, or fifteen cents a pound. The fact that this was to be paid in sterling at Liverpool shows that it could not have been contemplated between Elgee and Holmes, the agent of Nutt, that the cotton should be carried through the Union lines, because, under the Treasury regulations, no cotton could be bought within the Union lines on account of the Government, except for currency, such being the regulation, as appears by the published order of the Commander of the Department, which has already been passed upon by this court.

Again, it is objected on behalf of Mrs. Gaussen that Woodruff and Company did not perform the executory agreement of March 15, 1864, with Lobdell. To this it might be answered that unless Lobdell complains it does not lie in the mouth of Elgee or the United States so to do, for the case expressly finds that on the 3d of May Lobdell assigned to Woodruff and Company all his right and title as well in the original contract as in the subsequent contract, (Rec., pp. 36–37;) and further, that he assented that the suit should be brought in their name for his benefit.

It is suggested in the brief of Nutt that Fort Adams was within the Union lines, and the provision in the contract that the cotton should be delivered at or transported thereto would forfeit it within the commercial intercourse act.

The first difficulty with this suggestion is that the facts do not find whether Fort Adams was or was not within the Union lines. A second answer is, that, admitting Fort Adams to be within the Union lines, there is no finding of fact that the delivery there was to take place until it might be lawful so to do by the cessation of hostilities or close of the war; and it is not to be presumed that the parties intended to violate the law. Further, a simple intention to violate the law without any act done toward it works no forfeiture or disability.

Again, in the brief of Mrs. Nutt it is objected that the contract of March 15th and the endorsements of May 3d, assigning these contracts to Woodruff & Company, after the cotton had been taken by the United States, is an assignment of the *claim* only, and therefore obnoxious to the statute of February 26, 1853.

Originally, the Court of Claims held, by a divided court, that claims under the captured and abandoned property

act were within the purview of that statute; but after full revision, and the matter being more than once considered, have now, in a learned and exhaustive opinion, reached the conclusion that that statute is only directory upon the accounting officers of the Treasury, and, as we have already seen, the law establishing the Court of Claims itself assumes the right of assignees to bring suit at law against the United States as against any other party. Commending the opinion of the Court of Claims, Mr. Justice LORING, given in the case of Coté *vs.* United States, (4 C. C. Rep., 71,) which has since been adopted by the whole Court of Claims, as being entirely exhaustive of the subject, it is not necessary to pursue it further.

The revised decision of the Court of Claims has been made by that court, as the court holds in accordance with the decisions of this court in *Anderson's case* and the Floyd acceptance cases.

Lawrence & Crowell's case, 8 C. C. R., 252.

The argument in the brief of Mrs. Gaussen as to the effect of the contract in passing the property from Elgee to Lobdell has been sufficiently considered in a former part of this brief, and need not be repeated.

But it will be observed that the whole argument proceeds upon the ground that this was not a specific sale of the whole crop, but a sale of parcels by the pound, to which alone the authorities cited in that argument apply. Nor has the learned counsel adverted to or considered in his brief the effect of the civil code upon such a contract made where it was in force, and according to its provisions.

THE OBJECTION MADE TO THE ACTION OF THE COURT OF CLAIMS IN THESE CASES CONSIDERED.

But Mrs. Gaussen's brief, not content with using harsh

epithets and unjust aspersions upon other parties, claimants, turns its attention to the Court of Claims, employing phrases and words of characterization which it is respectfully submitted are not proper to be addressed to the Supreme Court of the United States when reviewing the decision of another court of the United States, respectable in its character, general in its jurisdiction, and composed of gentlemen more learned in the law, at least in their specialty of the law, than the counsel who prepared the brief.

Accordingly, we find such phrases as the following, (Brief, p. 27 :)

"But directly the court came to another and most *extra-*
"*ordinary* conclusion."

Again :

"While there are certain rare cases in which a court of
"equity will, in a suit properly brought for that purpose,
"decree the specific performance of contracts relating to
"personal property, a decree for the specific performance
"of a contract for the sale of corn or cotton would *be a*
"*decided novelty* in equity jurisprudence."
(Brief, p. 37.)

Again, (Brief, p. 21 :)

"In short, as a consequence of the general confusion,
"*the necessary result of the disregard of all regular rules*
"*of practice on the part of the representatives of the Gov-*
"*ernment below, a judgment was rendered on a* POOLING
"(*sic*) of all the evidence in all the cases, without regard
"to the parties between whom it was taken, and on the
"principle of a general and informal arbitration."

How unjust all this is to the Court of Claims will be seen by reading its opinion in 4 Ct. of Claims Rep., p. 487, Woodruff's case.

It is submitted that "pooling of all the evidence" is a phrase never before addressed to the Supreme Court of the United States, especially in reference to the action of five learned judges of another court of the United States of general jurisdiction. And this statement, too, is a summary of the argument upon an assignment of errors against a supposed interpleader in this case, claiming the Court of Claims had ordered such an interpleader, which is exactly what that court decided they did not do.

The facts, as shown by the Record, are these: Woodruff and Bouchard had, in 1865, filed a petition claiming the proceeds of this cotton. Several other parties, three years after, in 1868, had filed their petitions claiming the proceeds of the same cotton. Lobdell had filed his petition claiming the same title with Woodruff & Company for a portion of the proceeds. The court had ordered the cases of Lobdell and Woodruff to be consolidated, and then, at the motion of the counsel for the United States, had ordered that all the claimants should file petitions in the nature of petitions of interpleader with the consolidated case, not to interplead with the United States, the stakeholder, but to interplead with the first claimants, Woodruff & Co. and Lobdell, whose cases stood together.

It was objected to this order that by that means the evidence belonging to each case could not properly be considered by the court, and that each party would not have the right of cross-examination of the witnesses of the other party. All that matter was fully argued before the court, and a learned, and it is submitted satisfactory, opinion upon that question was given, as reported in 4 Court of Claims Reports, p. 487, before cited, in which it is expressly stated that these are not cases of technical interpleader, but that the cases were to be heard together, each case standing upon its own merits. This decision of the court was not excepted to, but all parties yielded to it.

It would seem to be a sufficient answer to all this that, as the Court of Claims has, by the third section of the act constituting it, the authority "to establish rules and regu- "lations for its government," and also by the revisory act of March 3, 1863, sec. 4, "may generally exercise such "powers as are necessary to carry out the powers hereto "granted to it," it is respectfully submitted that such rules and regulations, "and exercise of such powers," are not to be revised by this court, certainly not unless some substantial wrong or injustice is shown to have been done in the exercise of those powers or by those rules and regulations, and a special finding of fact in relation thereto shall be asked for and made a part of the by the court.

finding

No injustice or hardship is shown to have resulted to any one from the hearing of these cases together.

No exception was taken claiming that any incompetent evidence has been admitted. No right of any party is shown or claimed by the Record to have been imperilled by the course taken, and the question to be determined here seems to be whether the Court of Claims can hear its cases in such manner and form as, in its judgment, shall seem most conducive to the purposes of justice and the convenience of public business, and not have that order and manner of hearing supervised by this court without any report or finding of the facts in relation to it asked for or sent up which tends to show the propriety of its action in that behalf, or the grounds upon which the court proceeded.

It is submitted that there is no such finding of fact in this regard, and no such exceptions taken as to rulings in law, and no such objections made by the parties and brought here in proper form to be considered by this court, as will enable it to review the interlocutory proceedings of the court below.

It is further submitted that an appeal lies from the final

and not from the interlocutory judgments of that court, and that suggestions on brief of counsel like the following, (pp. 4 and 5)—

"From all which it appears that the parties had finally "succeeded in getting the cases into such a condition *that* "*neither counsel nor court knew what to do with them*, and "it resulted simply in their all being heard at the same "time on the aggregate mass of matter that had accumu- "lated."

"From this material resulted *a judgment as formless* "*and shapeless, and as independent of all rules of law* "*and practice, as was the material out of which it was* "*created, and for which the solicitor for the defendant,* "*and not the court, is responsible*—" are not sufficient grounds upon which this court can make any revision of the interlocutory judgments of that court.

Beyond this, it is submitted that this is the first time when it has been gravely alleged in a court of law that the solicitor of the defendant, and not the court, is responsible for the judgment of the court, even if that judgment were "*shapeless and formless, and independent of all rules* "*of law and practice.*"

It is apparent that all the prior petitions, and interlocutory matter in the court below, are not sent up here to cumber the Record, but only so much as is necessary to enable this court to understand the findings of fact and review the conclusions of law. Those are apparent on the Record; and the interlocutory proceedings are no more necessary for a proper decision and determination of those findings than would be the writ, pleadings, and depositions in a case at common law necessary to be sent up in order that the court might apply the law to the special verdict of a jury.

To the suggestion, made over and over again in the brief,

that the court actually gives judgment in favor of Lobdell, who was not a party to the record and no way before the court, for $54,363.60, (Brief, p. 5,) it is sufficient to say that Lobdell was a suitor before the court, as appears by the record, was a party to the record, and is expressly found to be so in the judgment when it was rendered, as we have heretofore shown.

Record, p. 18, copying judgment of court.

Again, error is claimed in the disposition of the proceeds as between Woodruff & Company and Lobdell after the court had found that the ownership of the cotton was in Lobdell.

To such suggestions it is answered that unless some error is found in the *proceeding* prior to the judgment of the court which decrees that Elgee, Nutt, and the United States have no title to this property, then they have no concern with and cannot allege error as to the disposition of the proceeds as between Woodruff & Company and Lobdell, especially as the record finds that Lobdell and Woodruff & Company were consenting to such a division.

LOBDELL DOES NOT COMPLAIN OF THIS HERE OR ELSEWHERE.

Volente non fit injuria; and if the parties supposed to be injured agree, and nobody else is harmed, who has any right to complain?

The only possible suggestion of interest in Mrs. Gaussen as to the disposition of this cotton as made in her brief, page 42, is, assuming the judgment of the Court of Claims to be right in this behalf, that interest should have been allowed her on the contract price of the cotton. But this, as we have seen, the civil code does not authorize in contracts of sale like that between Elgee and Lobdell, where no interest is stipulated for. (See this brief, page —.)

If we are correct in our views of the law, the case stands thus:

Lobdell had bought this cotton of Elgee, and taken upon himself all risks in regard to it by a contract to assume those risks. The case finds that immediately after the taking of the five hundred and seventy-two bales by Camp, the Treasury agent, the remaining fifteen hundred and twenty-eight bales were burnt by the raiders (Record, p. 24) after the contract of the 15th March, by which Lobdell transferred his entire right to this property to Woodruff & Co., holding, however, the possession in himself and, under the laws of Louisiana, at his own risks under all hazards.

The first error, therefore, of the court below, on account of which we ask a modification of the decree by this court, is in this: The court have charged the price of the fifteen hundred and twenty-eight bales destroyed against Woodruff & Co., who did not take the risk of that cotton, instead of against Lobdell, who did take the risk.

Woodruff & Co., by the contract of March 15, did not assume any of the risks in behalf of Lobdell, the seller to them, who retained possession and "ownership of the cotton," and under the laws of Louisiana, as we have seen, was charged with all risks, both as regards Elgee and Woodruff & Co., Lobdell's vendor and vendees.

By their contract with Lobdell, Woodruff & Company were only to pay him at 30 cents per pound for the cotton they "should receive from Elgee and Chambers, and not "for the whole twenty-one hundred bales." (Record, page 37.*) Woodruff & Co., therefore, are only bound to pay to Lobdell the extra twenty cents per pound on the five

* "Required" from Elgee & Chambers should be "received." A misprint.

hundred and seventy-two bales, which, by the decree, they do get, because, in his sale, they did not assume any risk, and 10 cents on the same number of bales to Elgee, and yet the court below has charged them with all the risk of all the 2,100 bales. Woodruff & Company, by the judgment of the court, receive the proceeds of five hundred and seventy-two bales of cotton, or 271,818 pounds. Upon this, by their contract, they are bound to pay thirty cents a pound only upon what they should receive by the express terms of their contract with Lobdell. By the judgment of the Court of Claims they have been obliged to pay Elgee's estate for its claim upon Lobdell, secured by lien upon the cotton, being the 10 cents per pound on not only the 572 bales they received, but also upon the 1,528 bales that were destroyed, to wit, $103,581.80, instead of 30 cents per pound on 572 bales, or 271,818 pounds, or $81,546.40 only, being the price of all the cotton they have received.

Second. We allege still further error in this.

The Court of Claims have adjudged interest as against Woodruff & Co., as well upon the amount adjudged in favor of Lobdell as the part due to the estate of Elgee.

Article 2531 of the code of Louisiana is as follows:

"The buyer owes interest on the price of the sale until "the payment of the capital in the three following cases:

"1. If it has been so agreed at the time of the sale.

"2. If the thing sold produced fruits or any other in- "come.

"3. If he has been sued for the payment. In this last "case the interest runs only from the day on which the "suit was instituted."

Neither of these conditions are found in this case, and,

therefore, no interest should have been charged against Woodruff & Company, either in the matter of the amount for which they were to indemnify Elgee's estate, standing in the place of Lobdell, or the amount which they were to pay Lobdell in advance of the amount to be paid Elgee's estate. In neither of the contracts was any stipulation for the payment of interest, and the thing sold "produced no "fruits or other income," and they have not been sued for the price. We respectfully submit that the decree should be reformed in this regard.

Third. Appellants allege error in this. There is no warrant in the facts found for the deduction of any other allowances than the freights and charges incurred prior to the sale of the cotton. By the stipulation in the suit between Elgee and the United States (see Record, p. 39) there was only to be deducted as follows:

"From the money received from such a sale enough "shall be reserved and applied by the agent of the Treas- "ury Department to pay such actual and reasonable ex- "penses connected with the care and sale of said cotton in "St. Louis, and such freight on said cotton from Natchez "to St. Louis, as may be agreed to by the agents or at- "torneys of said Elgee, or approved by the Secretary of "the Treasury, and also such other expenses, if any, at- "tending the transportation of said cotton to Natchez, and "such storage and other expenses chargeable to said "cotton at Natchez, as said agent of the Treasury Depart- "ment shall consider proper and just."

That amount was deducted from the gross proceeds by the court below in its judgment under the head of freight, charges, and expenses of and prior to said sales—(see Record, p. 24)—$45,349.12, if this includes freight and charges only. It is submitted that no other charge could be made against said cotton under the captured and abandoned property act, upon any facts found in the

record, which requires to be paid to the claimant the residue of such proceeds, (*i. e.*, paid into the Treasury,) "after the deduction of any purchase-money which may "have been paid, together with expense of transportation "and sale of said property, and any other lawful expenses "attending the disposition thereof." No fact appears in the finding of the court to authorize either "legal expenses, "$16,000," or the amount paid B. F. Camp for collecting, $30,000, or the amount paid Smith for his interest in said contract with Camp, $15,000. That these were not lawful expenses appears upon the very face of the judgment, which expressly finds that for the "last two items the United "States held the bonds hereto annexed, and marked Bond "1 and Bond 2, respectively," which bonds were bonds conditioned for repayment to the United States of these amounts in case the cotton should not be adjudged the property of the United States.

BENJ. F. BUTLER,
Of Counsel for Appellants.

Supreme Court of the United States.

OCTOBER TERM, 1874.

C. V. WOODRUFF & Co.
vs.
THE UNITED STATES. } No. 223.

ADDITIONAL POINTS AND AUTHORITIES TO MY FORMER BRIEF.

The contract construed by the rules of the common law

The obligation to pay is payment—is immediate sale.
Benj. on Sales, p. 232.

The sale of a specific chattel conveys the title and possession without delivery. As where, in Castle *v.* Playford, L. R., 5 Exch., 165, a sale *of a cargo* of ice *to be shipped*, the vendor forwarding bill of lading to the purchaser, and upon receipt thereof *the purchaser takes upon himself all risks* and dangers of the sea, rivers, and navigation, of whatever nature or kind soever, and Playford to buy and receive the ice on its arrival at 20 cents, weighed on board during delivery, the buyer was held responsible, because the property passed when the bill of lading was forwarded. (Benj. on Sales, 239–240)

So also in Martineau *v.* Kitching, L. R., 7 Q. B., 436. See also 20 Verm., 21. (Cole *v.* Kerr.)

The question in all these cases was, the sale being of a specific thing, did the title pass; it was held it did, in all of them.

If the goods are to be counted or measured *only* for the purpose of ascertaining the total sum to be paid at *desig-*

nated rates, the change of title is not affected, but is complete without it.

1 Black., 478.

Crofoot *v.* Bennett, 2 Comst., 258.

So, in Cushman *v.* Holyoke, 34 Maine, 289, where the property had actually passed to the purchaser in goods that were to be taken by him to another place, and there measured to fix the price, it was held that the vendor, and not the purchaser, must bear the loss and depreciation in measurement incident to removal according to common course of conveyance.

Intention must control construction.

Martineau *v.* Kitching, 7 Q. B., (L. R.,) 436.

34 Maine, 292.

13 Pick., 175.

20 Pick., 280.

The word *delivery* is used in different senses, and often leads to confusion in its application.

1st. Sometimes as to passing the property in the chattel, sometimes as to the change of possession, *i. e.*, transfer of *title or possession.*

Sometimes it is used as to the formation of the contract, and then as to *performance.*

Benj. on Sales, 553, 554.

As in this case, the words "to be *delivered* at Fort Adams" means, shall be *transported* by the vendors to Fort Adams, because the subsequent words, "the cotton will be *received* and *shipped* by the house of Da Silva & Co., New Orleans," means that the cotton shall be shipped *to* New Orleans *to* Da Silva & Co., *from* Fort Adams. And so of the words "to be paid for when weighed." 1st. The parties did not intend that the cotton should be *delivered* at Fort Adams. That is a small point from whence cotton is shipped to New Orleans. No such large lot of cotton could have been weighed *there*, and, above all, could not have been paid for *there.* 2d. The intention was, therefore, to

send it to New Orleans, to the common commission merchant of both parties, where the weighing was to take place and the payment to be made. That is the custom with respect to this staple. In the times and in the condition of the country when and where this transaction occurred, men did not dare carry large sums of money about their persons, and were not in the habit of paying or receiving large sums at points distant from New Orleans. Obviously, neither party contemplated either that the cotton would be paid for or delivered at Fort Adams. The fair interpretation of the contract will not admit of any other construction than the one we now give.

As to the laws of Louisiana, 7, 15.

1st. What may be sold in Louisiana. (Arts. 1879, 2423, 2424, 2457.)

In the transfer of debts, rights, or claims to a third person, the delivery takes place by the giving the *title*. (Art. 2612.

If the obligation be to deliver an *object* particularly specified, it is perfect by the mere consent of the parties. (Art. 1903.

So if the goods, *produce*, or other objects have been sold *in a lump*, the *sale is perfect*, though these objects may not have been weighed, counted, or measured. (Art. 2434.)

Thompson *v.* Gray, 1 Wheat., 75.

No form of transfer necessary.

12 Martin, 702.

13 Anna., 384.

No actual delivery of incorporeal rights can take place, but delivery of title sufficient between the parties.

Cox *v.* White, 2 La., 432.

Coppy *v.* Dowell, 1 Rob., 26.

1st. *Bona fides* of Lobdell.

The findings fix these *bona fides*.

The court looked into the facts, had all the evidence before them, and find that the parties had the proper qualifi-

cations to contract in law and in fact, and that there was a *sale* and *delivery*. (Record, 24, bottom.)

The *acts* of the parties fix it also.

1. Elgee said he had sold to Lobdell. (Record, 22.)

2. Gordon said to Camp it had been sold to a firm in New Orleans. (Record, 23.)

3. Morris told Camp it had been purchased by Woodruff & Co.

4. Lobdell could not move it on account of the disturbed state of the country. (Record, 24.)

But if there was a secret agreement between Elgee or Gordon and Lobdell, not disclosed to Woodruff & Co., it does not affect or in any wise impair the title which Lobdell gave Woodruff & Co.

No man shall set up his own fraud as the basis of a right or claim for his own benefit.

Benjamin on Sales, 397.

A *bona fide* purchaser, for a valuable consideration, before the bill of sale is impeached, will be protected.

Ib., 397.

The sale of the contract, according to the law of Louisiana, carries the *ownership* of the thing *particularly specified* in it, as between the parties. "It renders the creditor the *owner, and although it was not delivered to him*, puts the *thing* at his risk from the date of the obligation, if the contract was one of those that purport a transfer." Art. 1904.

So, in Art. 2615 the sale or transfer of a debt *includes everything* which is an *accessory* to the same, as *suretyship, privilege and mortgages.*

The *bona fide* of this transaction are not questioned, so far as I know.

Whatever *possession* of the property was enjoyed by Lobdell was transferred to Woodruff & Co. by the assignment of the Elgee contract.

So, whatever rights of ownership followed the execution

of the contract belonged to Woodruff & Co. after the assignment.

Now, 1st. Morris took the possession when the contract of the 31st July, 1863, was made, and was so holding the cotton when the agreement of the 15th March, 1864, was made, and he "continued his care of the cotton till it was taken possession of in the name of the United States." (Record, 22.)

2d. Both Morris and Gordon notified Camp at the time the cotton was seized, that the cotton had been purchased by a firm in New Orleans.

3d. They (Woodruff & Co.) commenced their suit in the Court of Claims for this cotton on the 26th day of April, 1865, which was, in fact, before the proceeds had reached the Treasury, and have ever since continued to pursue their rights to it.

4th. In the petition the fact appears that Woodruff & Co., on the 2d of April, 1864, *before the property was seized*, had procured permits to remove this very cotton to New Orleans. These *facts* are stated because they are *in the Record*. And while the latter may not be *evidence*, as established, that the permits were issued as therein stated, it is a circumstance to be considered as a part of the history of this case. The *first* establishes the *fact* that Woodruff & Co. did move at the earliest day possible to assert their right to the proceeds of the cotton, and is, for that purpose, *evidence*.

These citations are made to show that Woodruff & Co., *acting* upon the *faith* that Elgee & Chambers and Lobdell had made the contract of the 31st of July, 1863, in *good faith*, and entered upon the performance of it in the same *good fatth*. Their rights having been secured by the transfer of the contract, and completely *vested* the interest in the cotton, could not be divested by reason of any *secret* understanding by the original vendors and vendee. To affect them or their rights, there must be notice brought home to them of this fact. Here the *findings* of the

Court of Claims are silent, leaving us to conclude that there was no proof in the case on this subject That leaves these parties with a contract free from any such difficulty, and entitles them to enjoy it and its fruits, without limitation on that particular account.

R. M. CORWINE,
Of Counsel.

Supreme Court of the United States.

OCTOBER TERM, A. D. 1874.

JULIA A. NUTT, executrix of HALLER NUTT, deceased, Appellant, *vs.* THE UNITED STATES.	No. 223.
BESSIE ELGEE GAUSSEN, executrix of JOHN K. ELGEE, deceased, Appellant, *vs.* THE UNITED STATES.	No. 143.
THE UNITED STATES, Appellants, *vs.* C. V. WOODRUFF and A. BOUCHARD, JULIA A. NUTT, executrix of HALLER NUTT, deceased, MARY A. WELLS *et als.*	No. 142.
C. V. WOODRUFF & COMPANY, Appellants. *vs.* THE UNITED STATES.	No. 166.

Brief by JOSEPH CASEY,

Of Counsel for Elgee's and Nutt's Estates.

Judd & Detweiler, Printers.

Supreme Court of the United States.

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JULIA A. NUTT, executrix of HALLER NUTT, dec'd,
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C. V. WOODRUFF & COMPANY, Appellants,
vs.
THE UNITED STATES. } No. 166.

HISTORY OF THE CASE.

Elgee's Title.

At the breaking out of the rebellion John K. Elgee was a prominent lawyer, residing at the town of Alexandria, in the parish of Rapides, State of Louisiana. He had resided and practiced his profession there for nearly thirty years; and his wife and family continuously lived there with him. He owned real estate in the parish.

He also became the owner, in the early part of the war, o

three cotton plantations lying in Wilkinson county, Mississippi, from seven to ten miles back from the Mississippi river at Fort Adams. A man by the name of Chambers was interested with Elgee in the cultivation of these plantations. In the summer of 1863 they owned and had stored on or near these plantations, twenty-one hundred bales of cotton. Elgee and Chambers were both more or less implicated in the rebellion, and this cotton was liable to seizure and confiscation under the act of July 17, 1862, and to capture and sale under that of March 12, 1863. Chambers afterwards relinquished for a consideration all his interest in the cotton to Elgee.

The Lobdell-Bouchard Title.

On the 31st July, 1863, William C. Gordon, agent for Elgee & Chambers, made the written agreement with C. S. Lobdell, set forth in record, page 36. Lobdell at this date resided in the parish of West Baton Rouge, Louisiana, about nine miles above Baton Rouge, and some twelve miles back from the Mississippi river, within the rebel lines.

At this time Wilkinson county, where the cotton was stored, West Baton Rouge Parish, where Lobdell resided, and Alexandria, in Rapides Parish, La., where both Chambers & Elgee were domiciled, were all in rebel territory. Fort Adams, on the Mississippi river, where the cotton was to be delivered, weighed, and paid for, and New Orleans, where it was to be shipped to market, were held, occupied, and controlled by the Union forces.

On the 15th March, 1864, V. Hebert, a resident of the city of New Orleans, as agent for C. S. Lobdell, made a written contract of sale of the contract which his principal had with Elgee & Chambers for the purchase of this cotton, to C. V. Woodruff & Co., residents of the city of New Orleans. Woodruff & Co., at the time of receiving the cotton, were to pay to Hebert three hundred thousand dollars; one hundred thousand for Elgee & Chambers and two hundred thousand

for Lobdell. *The cotton to belong to Lobdell until this consideration should have been paid. This consideration never was paid.* (See pp. 36 and 37 of the Record.)

On the 3d of May, 1864, after the seizure and shipment of this cotton, Lobdell, by the following endorsement on his contract with Elgee & Chambers, assigned the same to Woodruff & Co.:

"I hereby transfer all of my right, title, and interest to the within contract to Messrs. Woodruff, of the city of New Orleans.

"C. S. LOBDELL.

"MAY 3, 1864."

No part of the cotton was ever delivered, and no part of the three hundred thousand dollars, unless it was a very insignificant sum, was ever paid to Elgee or to Lobdell.

The Title of Haller Nutt.

Dr. Haller Nutt was the owner of a large cotton plantation on Lake St. Joseph, in Tensas Parish, La., where he had his legal residence and domicil. He also had a country seat or summer place about three miles in the rear of Natchez, Miss., called "Longwood." When that country was overrun by the contending armies, and the city of Natchez fell into the possession of the Union forces, Dr. Nutt, being a Union man, repaired with his family to his house, near Natchez, and remained there during the war. He went on passes back and forth to his plantation whenever he had occasion or desired to do so.

In the autumn of 1863, Dr. Nutt procured Truman Holmes, a resident of Natchez, to go to Rapides Parish, in Louisiana, where Elgee resided, and purchase from him his cotton then on his plantations in Wilkinson county, Miss. The agreement between Holmes, as the agent of Nutt, and Elgee is witnessed by the writing on p. 36 of Record, dated October 8, 1863.

This contract, with a letter from Elgee to his agent, Wm. C. Gordon, in charge of the cotton, was presented by Holmes to Gordon, and was assented to and ratified by him, agreeing to hold the cotton subject to this agreement. This was soon after the date of his contract. The neighborhood in which the cotton was located was then in possession of the rebels, and was so infested with guerrillas that it was then impossible to get the cotton out.

The Seizure of the Cotton.

In consequence of the presence of rebel scouts and guerrillas, the cotton remained on Buffalo Bayou, some ten miles from Fort Adams, until the 2d day of April, 1864. At this time a United States gunboat and transport went up the bayou, and seized five hundred and seventy-two bales, all the transport and gunboat could carry. On the same day, after the gunboat left, the rebel forces appeared, set fire to, and burned the balance of the cotton.

The 572 bales seized were taken to Natchez, turned over to R. S. Hart, the Treasury agent there. He, about the 1st of May, 1864, shipped it to William P. Mellen, supervising Treasury agent, to St. Louis. It was received there by Mr. Mellen's deputy, Oliver S. Lovell, Esq. Elgee, who had followed the cotton to St. Louis, brought an action of replevin against Lovell for the cotton, in the State court at St. Louis. The Secretary of the Treasury employed counsel to defend the possession of the officers of the United States. At their instance the case was transferred to the circuit court of the United States for Missouri; and an agreement was entered into between the United States and Elgee that the cotton should be sold, and that the expenses connected with the care and sale of the cotton should be first deducted from the proceeds, and the balance should be invested in ten-forty bonds of the United States, and placed as a special deposit with the Assistant Treasurer of the United States at St.

Louis, subject to the order of the Solicitor of the Treasury, &c., to abide the event of the suit, the proceeds being in lieu of the cotton. (See agreement, pp. 38, 39, and 40, of Record.)

It was held that the jurisdiction of the Court of Claims was exclusive, and the suit dismissed.

Elgee died in October, 1864, while on a temporary sojourn on business at New Orleans. His wife and family still residing at Alexandria, in the parish of Rapides, Louisiana. Letters testamentary on his will were obtained from the probate court at New Orleans, by Bessie Elgee Gaussen, and she brought suit in the Court of Claims, in 1868, to recover the proceeds of these 572 bales of cotton, under the captured and abandoned property acts. Judgment was entered in her favor for $137,882.62.

Lobdell also brought suit in the Court of Claims, alleging he was the owner of the cotton and entitled to the proceeds under his contract with Elgee and Chambers, of July 31, 1863. (Record, p. 36.) On the 7th of April, 1869, this suit was dismissed by the Court of Claims, and at the time of the trial of this cause in the court below, no suit by Lobdell or for his use was pending in that court.

A similar suit was brought by Archibald Montgomery, which had also been dismissed some years before the trial.

Another suit, in the name of Mary J. Wells and others, heirs of Elgee, was also brought. But the parties have been unable to show any available title, and the suit is not now pending.

Woodruff and Bouchard, under their contract with, and assignment from, Lobdell, also instituted suit in the Court of Claims to recover the entire proceeds of the 572 bales of cotton. In this case the court entered a duplicate judgment, first, in favor of Lobdell for $72,365.95; second, in favor of Woodruff & Co., for $155,922.26.

Haller Nutt having died, suit was brought by his executrix to recover the proceeds under the contract made with

Holmes, of October 8th, 1863. The Court of Claims held that the contract with Lobdell being prior in time was the stronger in right. That it was valid and available and transferred the title to Lobdell, and through him to Woodruff and Bouchard. Also, that the agreement between Nutt and Elgee was void, as being in violation of the non-intercourse laws. The Court of Claims ordered the petition to be dismissed and Mrs. Nutt appealed.

The Court of Claims, on the application of the counsel for the United States, made an order requiring all these parties to interplead with each other, as well as with the United States; and by its orders and proceedings virtually consolidated all into one suit, and required them to be tried together and at same time, and thus undertook to try and determine the separate and conflicting rights between these individual parties themselves, as well as between them severally and the United States. On that trial, the various depositions taken in the separate cases, without notice to, or cross-examination by any of the other claimants, were read in this general trial, or rather *scramble*, affecting and operating upon the determination of this consolidated case, against the objections of such contesting claimants, made and entered previous to the trial. (See 4 Court of Claims Report, 486.)

After trying this *conglomerated* case in the manner stated, the Court of Claims proceeded to make a supposed equitable distribution of these proceeds, making a decree in favor of C. S Lobdell, who had no suit pending, was no party to the proceedings, and had no standing in court, for $72,365.95. They apportioned the other between Woodruff & Bouchard and Elgee's executrix.

The court deducted for certain matters claimed as credit for expenses the sum of $106,349.12. When the expenses deductable under the law and the agreement of the parties was only $29,040.04.

Although the funds were invested in interest-bearing bonds, the court entered the judgment without interest.

The deductions claimed to be made, were for disbursements by the Secretary of the Treasury after the payment of the proceeds into the Treasury, and after the agreement of June 24th, 1864.

Assignments of Error.

The appellants, Julia A. Nutt, executrix of Haller Nutt, deceased, and Bessie Elgee Gaussen, executrix of John K. Elgee, deceased, make the following assignments of error:

The Court of Claims erred—

1st. In deciding that the contract between Elgee and C. S. Lobdell, dated July 31st, 1863, transferred to the latter the property in the cotton without delivery, ascertainment of weight, or payment of the purchase money, as required by the contract.

2d. In deciding that this contract was valid, the parties thereto both residing within the rebel territory, and the cotton, which was the subject of the contract, located within the same lines. While the consummation of the contract, by the delivery of the cotton and the payment of the price, was to be within the Union territory, to wit: At Fort Adams, Mississippi.

3d. In deciding that the contract and the assignment thereof by Lobdell to Woodruff & Bouchard without the delivery of the cotton, payment of the stipulated price, or ascertainment of the weight, as the contract required, would transfer to them the property in the cotton and its proceeds, so as to enable them to maintain their suit as the owners thereof, under the "abandoned and captured property act."

4th. In deciding that the contract between Lobdell and Woodruff & Bouchard was valid and available, although Lobdell, at the time it was made, resided within the rebel lines, and the cotton was also situated there, while Woodruff

& Bouchard resided within the Union lines, and the delivery of the cotton to them, and the payment of the purchase money by them, were to take place within the Union lines.

5th. In deciding that the contract between Holmes, the agent of Haller Nutt, and Elgee did not transfer the property in the cotton to Dr. Nutt.

6th. In deciding that the contract between Haller Nutt and Elgee was a violation of the non-intercourse act, although both resided at the time the contract was made within the insurrectionary territory, and the cotton was also situated in such territory.

7th. In rendering a judgment in favor of Lobdell, whose suit in the Court of Claims for the proceeds of this cotton had been dismissed, and who was no party to the record in these proceedings when such judgment was rendered.

8th. In deciding that the assignment of the contract between Elgee and Lobdell, by the latter to Woodruff & Bouchard, subsequent to the seizure of the cotton, would give a right of action for the proceeds of the said cotton to Woodruff & Bouchard, and enable them to maintain a suit for such proceeds under the "abandoned and captured property act" in their own names.

9th. In ordering and compelling the several parties claiming the proceeds of the said cotton in their several suits, in the Court of Claims, to interplead each with the others, and directing the conflicting claims of the said parties to the proceeds of the said cotton to be heard and determined together, as one case.

10th. In deducting from the proceeds of the said cotton paid into the Treasury, the sum of $106,349.12 for amounts paid Camp & Smith, legal expenses, internal revenue tax and custom-house fees.

Record, p. 24.

11th. In admitting the depositions of the several witnesses, taken in the various conflicting suits for the proceeds of the said cotton against the other contesting claimants, such depositions having been taken without notice to such contesting claimants, or cross-examination by them.

Argument.

I. THE CONTRACT BETWEEN ELGEE AND LOBDELL, DATED JULY 31, 1863, DID NOT TRANSFER THE TITLE TO THE COTTON TO LOBDELL.

The title to the cotton could not, under this contract, pass from Elgee to Lobdell until the delivery of the cotton at Fort Adams, the ascertainment of the weight and the payment of the contract price. All these were conditions precedent to a completed sale and the transfer of the title to Lobdell. This contract contemplated that there should be a delivery and the ascertainment of the quantity sold, and the payment of the purchase money. And where these remain to be done, and there is no delivery, the title to the property remains in the vendor. This delivery could not be made without violating the non-intercourse laws.

Montgomery *vs.* The United States, and authorities cited, 5 Court of Claims, pp. 658, 659, 660.
McDonald *vs.* Hewett, 15 John. R., 349.
Rapelye *vs.* Mackie, 6 Cowen, 250.
Outwater *vs.* Dodge, 7 Cowen, 85.
Young *vs.* Austin, 6 Pick., 280.

Where nothing is said in the contract as to the time of delivery and payment, the vendee is only entitled to the goods on tender or payment of the price.

Leonard *et al. vs.* Davis *et al.*, 1 Bl., 476.

Nor was the title of the property changed by the provision in the contract, that the cotton, from the date of the contract,

"*was at the risk of Lobdell.*" The evident object and purpose of this provision was to stimulate Lobdell to increased activity, in complying with the terms and conditions of the sale.

In this case, it is very clear that delivery of the property and payment of the price, were to be simultaneous and no property passed till that was done. They were conditions precedent.

Mason *vs.* Thompson, 18 Pick., 305.
Law *vs.* Andrews, 1 Story, 38.
New York Firemen's Ins. Co. *vs.* De Wolf, 2 Cow., 56.

Lobdell had no title and no right to possession till he paid or tendered the price.

Bloxam *vs.* Sanders, 4 B and C., 941.
Benjamin on Sales, 501.

In such case, to transfer title to vendee both right of property and right of possession are requisite.

Gordon *vs.* Harper, 7 Tenn Rep., 9.

As to time of payment, he was bound to pay or tender in a reasonable time. No demand was necessary.

Wm. S. Saunders, 33 b. 1, n, 2.
Benjamin on Sales, 525.
Hanson *vs.* Meyer, 6 East., 614.
Story on Sales, Sec. 296, *et seq.*

II. THE CONTRACT WAS IN VIOLATION OF THE NON-INTERCOURSE ACTS, BECAUSE IT PROVIDED FOR CONSUMMATION BY THE DELIVERY OF THE COTTON AT FORT ADAMS WITHIN THE UNION LINES, ALTHOUGH THE PARTIES TO THE CONTRACT AND THE COTTON WERE WITHIN THE REBEL LINES AT ITS DATE.

The Reform, 3 Wallace, 617.
The Sea Lion, 6 Wallace, 630.

The Ouachita Cotton, 6 Wallace, 521.
Coppell *vs.* Hall, 7 Wallace, 542.
United States *vs.* same, 8 Wallace, 185.
Montgomery *vs.* The United States, 15 Wallace, 395.
United States *vs.* Lapene and Ferree, 17 Wall., 601.

The sale of the cotton by Elgee and Chambers to Lobdell was not only void as to the United States, but equally so as between themselves, and every person claiming under them. It was in violation of a positive statute, and incapable of being confirmed or validated by any subsequent action of the parties to such contract.

III. WOODRUFF AND BOUCHARD ACQUIRED ONLY SUCH TITLE IN THE COTTON, UNDER THEIR CONTRACT WITH LOBDELL, AS LOBDELL HAD ACQUIRED FROM ELGEE, AND BY THE TERMS OF THE CONTRACT BETWEEN WOODRUFF AND BOUCHARD AND LOBDELL, IT WAS EXPRESSLY AGREED "*by both of the contracting parties that this cotton belongs to Mr. Lobdell until the consideration of thirty cents per pound upon the cotton shall be paid, viz., ten cents per pound to or for account of Elgee and Chambers, and twenty cents to or for account of said Lobdell as aforesaid.*"
Record, pp. 36, 37.

The payment of the price and the ascertainment of the weight were *conditions precedent* to the transfer of the title, and it is a principle established by all the authorities that where these remained to be done the title of the property sold does not pass to the buyer.

Wallace *vs.* Meyer, 6 East. Rep., 614.
Rug *vs.* Minet, 11 East. Rep., 210.
Withers *vs.* Lyss, 4 Campb., 237.
Wallace *vs.* Breeds, 13 East. Rep., 522.
Austin *vs.* Craven, 4 Taunton, 644.
White *vs.* Wilkes, 5 *Ibid.*, 176.

Acraman *vs.* Morris, 8 C. B., 449.
Bailey *vs.* Smith, 43 N. H. Rep., 141.
Henning *vs.* Powell, 37 Pa. Rep., 187.
Civil Code of La., Article 2433.
Campbell *vs.* Penn, 7 La. An. Rep., 371.
Parmele *vs.* McLaughlin, 9 *Ibid.*, 439.
Shuff *vs.* Morgan, 9 M., 592.
Wilson *vs.* Phillipp, 4 La. An. Rep., 158.

IV. THE CONTRACT BETWEEN WOODRUFF & BOUCHARD AND LOBDELL WAS IN VIOLATION OF THE NON-INTERCOURSE ACTS, BECAUSE AT THE TIME IT WAS ENTERED INTO WOODRUFF & BOUCHARD WERE RESIDENTS WITHIN THE UNION LINES AND LOBDELL WAS WITHIN THE REBEL LINES.

The contract was not made by Lobdell in person, but by Victor Hegbert, his agent, and the contract describes Lobdell as a person residing in the parish of West Baton Rouge, which was within the rebel lines.

Record, p. 37.

Even if Lobdell had at that time been *temporarily* present in New Orleans, and had entered into the contract with Woodruff & Bouchard in person, still the contract would have been equally void, because it had its origin in and resulted from an intercourse between the parties which was unlawful.

See authorities cited in support of second proposition.
See, also, 1 Kent's Commentaries, p. 66.
The Bella Guidita, reported in the *Hoop*, at page 208, of 1 C. Rob. R.

V & VI. The contract between Elgee and Holmes, as the agent of Nutt, did not contemplate the payment of any money, nor even the ascertainment of weight, &c., until the cotton arrived at Liverpool. The contract was for all the

cotton at so much per bale, and transferred the title and property and right of possession to Nutt at once. No time was fixed for the shipment to Liverpool. But it must have been necessarily implied that this was to take place when the cotton could be removed and shipped without violation of the non-intercourse laws.

The finding that Nutt resided within the Union lines is an error, which the court was led into by the double mistake of attempting to decide the private controversies between Nutt's executrix and Elgee's estate, and also with Woodruff & Bouchard. And by admitting the testimony and proofs in the other cases to affect our rights and interests.

VII. *At the time these cases were tried and judgments rendered therein Lobdell was not a party to the record* in any case before the court, and the Court of claims had not, therefore, *jurisdiction of his claim, nor any power to render any judgment in his favor.*

The Court of Claims could only render a judgment in favor of Lobdell, upon the ground that he was the owner of the cotton, and entitled to its proceeds.

The jurisdiction of that court is special and limited by the terms of the statute in this and all other cases. Under the third section of the act of March 12, 1863, its duty was confined to the determining who was the owner of the cotton and entitled to the proceeds. The assumption by it of extensive equitable powers in endeavoring to adjust inchoate and equitable rights between conflicting owners was without jurisdiction and void. This court, in Bonner *vs.* The United States, has distinctly held that the Court of Claims possessed no equitable powers.

9 Wallace, 156.

5 Court of Claims Rep., 645.

VIII. *Even if Lobdell had such a property in the cotton under his contract with Elgee as would have enabled him to maintain*

his suit for the proceeds thereof, still his assignment of that contract to Woodruff & Bouchard, dated May 3, 1864, *after the seizure of the cotton, was void under the act of Congress approved February* 26, 1853, (10 Stats. at Large, p. 170,) *and conferred no right upon Woodruff & Bouchard to maintain a suit for the proceeds of the cotton.*

After the seizure of the cotton by the officers of the United States it became *a claim against the United States* for the amount of the proceeds, and only the owners of the cotton at the time of such seizure, could maintain an action against the United States in the Court of Claims for the proceeds, which had resulted from the sale of the cotton. The *cotton*, subsequent to its seizure by the United States, could not be the subject of sale between the parties, because there could be no delivery thereof. The cotton, subsequent to its seizure, was exclusively in the possession of the United States, and its proceeds could only be disposed of as provided in the third section of the abandoned and captured property act, and it was, therefore, only a *claim* against the United States.

The decision of the Court of Claims in this case is doubtless based upon the assumption that the prohibition contained in the act above cited was limited—

1st. To claims adjusted and settled in the Executive Departments of the Government.

2d. That it was repugnant to, and impliedly repealed by, the 12th section of the act of March 3d, 1863, by which the Court of Claims was reorganized and its jurisdiction increased.

There is no language in this statute which justifies the limited construction which the Court of Claims gives to it. That act, in express and most explicit terms, refers to and includes "*all transfers and assignments* of any claim upon the United States, or any part or share thereof, or interest there-

in, whether absolute or conditional, and whatever may be the consideration therefor," &c. There would seem to be no room for *construction* here; and what warrant any court has to limit and restrict to special and particular claims a legislative enactment so broad, universal, and radical in its terms, I am at a loss to determine.

3d. *Implied* repeals are not favored in the law; and courts will not hold an act repealed unless by a subsequent act expressly repealing it, or by a revised act covering and embracing the whole subject, or by such subsequent contradictory and repugnant legislation as that the two cannot stand and be construed harmoniously together.

Sedgwick on Statutes, 126–429.
Dwarris on Stat., 532.
Henderson Tobacco, 11 Wall., 652.
U. States *vs.* Spirits, 11 *id.*, 356.
Wool *vs.* U. States, 16 Peters, 342.
McCool *vs.* Smith, 1 Bl.; 459.
U. S. *vs.* Taylor, 3 How., 197.
Furman *vs.* Nichols, 8 Wall., 44.

IX. The Court of Claims had no jurisdiction to require the several parties, asserting conflicting claims to the proceeds of this cotton, to interplead each with the other, or to direct and require that all of the conflicting claims to the proceeds of this cotton should be heard and determined as a single suit.

1st. The acts establishing the Court of Claims and defining its jurisdiction limit and restrict its powers to the hearing and determining of "*claims against the United States.*"

2d. There is not, nor can there be, any *implied* power in the court to hear and determine incidental controversies, arising between individuals out of the prosecution of such claims.

3d. In this case Elgee's executrix denied the validity of the contract executed by Elgee to Lobdell, and she claimed that it being void the estate of Elgee was entitled to *all* the proceeds resulting from the sale of this cotton.

4th. The determination of *that* question, being a controversy between Elgee's executrix and Lobdell, the former, under the Constitution, had the right to have it determined by a jury.

5th. She also had a right to have it determined in a court where the parties to such controversy could be witnesses, under the laws of the United States, and in a court having full chancery powers, to obtain proofs and compel discoveries of evidence, material to the determination of the questions in controversy.

6th. The Court of Claims had no jurisdiction of the controversies between Elgee's executrix and Lobdell, and Woodruff & Bouchard, his assignees.

7th. If any such questions between them arose in the progress of the cases, it was the duty of the Court of Claims to compel the parties to them to have them determined by a competent tribunal, having jurisdiction both of the parties and the subject-matter; and in the meantime suspend proceedings in the Court of Claims till such judgment came in.

X. *The depositions of the several witnesses taken in the case of Woodruff & Bouchard in the Court of Claims were not admissible either against Elgee's executrix or against the executrix of Haller Nutt.*

They were all taken without notice to the several contesting claimants, and there was no opportunity afforded to them, or either of them, to cross-examine such witnesses. The Court of Claims in these cases held that such testimony could

not be used against the party, who had no opportunity to cross-examine the witnesses.

4 Court of Claims, R., 486.

And yet, upon the hearing of these cases, the Court of Claims necessarily admitted and considered such testimony in determining the rights of these conflicting parties against each other.

XI. *It appears from the return of the Secretary of the Treasury that out of the proceeds of the sale of the cotton there was charged against it and deducted from such proceeds, among others, the following items of expense, viz:*

Custom-house fees on 271,818 pounds, at 4 cents per pound	$10,872 72
Internal revenue tax, 2 cents per pound	5,436 36
Expenses paid to attorneys in defending the suit brought by Elgee against the Treasury agent	16,000 00
Amount paid to Camp and Smith for seizing the cotton	45,000 00
Total	77,309 08

The whole amount deducted was $106,349.12; leaving for expenses of transportation and sale, $29,040.04.

No part of this sum of $77,309.08 was legally or properly chargeable against this fund.

The third section of the act of March 12, 1863, specified what expenses should be deducted from the proceeds of the sale of such property. Those items of expense are—

1st. Any purchase money that may have been paid for the property sold.

2d. Expenses of the transportation and sale of the property.

3d. Any other lawful expenses attending the disposition of the property seized and sold.

The several items of expense objected to do not come within either of these items. They were neither purchase money, nor expense of transportion and sale of the cotton, nor other lawful expenses incident to the disposition of the property. Their deduction was a plain and palpable violation of the statute, under which this property was authorized to be seized and sold.

This deduction was also in violation of the agreement between the Solicitor of the Treasury and Elgee's attorney, made during the pendency of the suit, brought by Elgee against the Treasury agent to recover the cotton. This agreement is found in the record at pages 38, 39 and 40, and the *third* clause of that agreement specifies the expenses which the Secretary of the Treasury may deduct from those proceeds, and how they shall be determined.

The charge for custom-house fees were not properly chargeable against this cotton, even under the Treasury regulations. Those regulations were promulgated September 11, 1863, and that under which these fees are claimed is as follows:

XLII. "The following fees are prescribed: * * * "Fee for each permit *to purchase cotton in any insurrection-* "*ary district*, and to transport the same to any loyal State, "four cents per pound."

Revised Regulations, p. 77.

The terms of this regulation expressly exclude the cotton involved in this suit. It was not cotton *purchased* or shipped under any Treasury permit. It was seized by the Government and shipped by it on its own account, and for its own benefit.

The deduction of the internal revenue tax from the proceeds resulting from the sale of this cotton was equally unauthorized and unlawful.

The act under which the right to deduct this tax was claimed, is the *fourth* section of the act of March 7th, 1864, (13 Stat. at Large, pp. 15, 16,) and the *proviso* in that section expressly exempts from such tax, "all cotton sold by or on account of the United States."

This construction of that act is recognized by the provisions of the *sixth* section of the act of June 10th, 1872, (17 Stat. at Large, p. 369.) This act directs that in the settlement of the judgments of the Court of Claims, or of the Supreme Court, thereafter rendered, for captured and abandoned cotton, the Secretary of the Treasury shall pay such judgments in full, "*without deductions on account of internal revenue tax on cotton.*" This must be regarded as a most direct and explicit legislative construction, by Congress, of the provisions of the *fourth* section of the act of March 7th, 1864, above referred to.

The deductions of the sums of $45,000 paid to Camp and Smith, and $16,000 paid to different attorneys for legal services in resisting the right of Elgee to this cotton and its proceeds, were also illegal and inadmissible as credits. They were deducted after the money resulting from the sale of the cotton had become a special deposit in the Treasury, and when the Secretary of the Treasury had no further power or control over it. These deductions are so clearly in violation of both the statute and the agreement to which we have hitherto referred, that there seems no necessity for a further discussion of them.

In every light in which I can look at the questions involved in this record, it appears to me impossible to sustain these judgments, decrees, or awards, or whatever else they may be called. The case is bristling all over with the most radical and fundamental errors. Errors, too, which give to parties who

have no scintilla oflegal right, or even a remote or shadowy equity, a large part of these funds, for which they have paid no farthing. My clients look to this court to correct these mistakes, and to give them what is rightfully and lawfully their due.

Respectfully submitted.

JOS. CASEY,
Of Counsel for Elgee's and Nutt's Executrixes.

Supreme Court of the United States.

JULIA A. NUTT, EXECUTRIX OF HALLER NUTT, DECEASED, *Appellant*,

vs.

THE UNITED STATES

REFERENCES TO AND MEMORANDA OF THE LEADING AUTHORITIES CITED AND RELIED ON.

BY

JOSEPH CASEY,
Counsel for Appellant.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 223.

JULIA A. NUTT, Executrix of HALLER NUTT, Deceased,

vs.

THE UNITED STATES.

Reference to and memoranda of some of the leading authorities cited and relied on by the counsel of appellant to sustain his positions:

I. That no property or title passed to Lobdell, or his assignees, under the contract with Elgee and Chambers.

II. There being no actual delivery, even if the property had passed, it was void as to Nutt, who was a subsequent *bona fide* purchaser, without notice of the first sale.

III. That Nutt's contract constituted a completed and perfected sale, both under the common law and that of Louisiana.

IV. That this contract was not subject to annulment or rescission by the vendors, without notice to Nutt, and then only by a proper suit.

V. That the contract of Lobdell with Elgee and Chambers and of Lobdell with Woodruff & Co. were void, as they

could only be consummated by a breach of the non-intercourse laws.

VI. That the assignment by Lobdell to Woodruff & Co. of May 3, 1864, is void under act of February 26, 1853. 10 Stat., 17.

VII. That as Haller Nutt was a citizen of, and a resident in, a State declared in insurrection, and the place where he resided, though for the time being occupied by the military forces of the United States, had not been declared by any competent authority as excepted out of the interdict of the act of July 13, 1861, his contract with Elgee of October 8, 1863, was not in violation of that act.

I. NO TITLE OR PROPERTY PASSED TO LOBDELL BY THE CONTRACT OF JULY 31, 1863.

English Authorities.

Hanson *vs.* Meyer, 6 East., 626.—STARCH CASE.—Lord Ellenborough:

"Till it was weighed they (the warehouse-men) were not authorized to deliver it. Still less were the buyers themselves, or the present plaintiffs, their assignees, authorized to take it by their own act from the Bull Porters' warehouse; and if they could not so take it, neither can they maintain this action of trover founded on such a supposed right to take, or in other words founded on such a supposed right of property in the subject-matter of this action. If anything remains to be done on the part of the seller, as between him and the buyer, before the commodity purchased is to be delivered, a complete present right of property has not attached in the buyer."

Zagurny *vs.* Furnell *et al.*, 2 Campb., 240.—GOAT SKINS CASE.—Lord Ellenborough:

"The number of skins contained in the 289 bales being uncertain, the plaintiff had failed to show that he was author-

ized to draw the bills which the defendants had refused to accept."

Rugg *vs.* Minett, 11 East., 217.—TURPENTINE CASE.

"Till the several casks were filled up I consider the property as remaining in the sellers."

Gilmour *vs.* Supple, 11 Moore's P. C., 551.

Hon. Sir Cresswell Creswell reviews all the cases, and adopts the rule of the above cases; citing them and Wallace *vs.* Breeds, 13 East., 522, and Simmons *vs.* Swift, 5 B. & C., 857.

Simmons *vs.* Swift, 5 B. & C., 857, 1826.—*Sale of a Stack of Bark.*

Where the owner of a stack of bark sold it at so much per ton, &c., weighing was essential to pass the property.

Bayley, J.:

"If anything remains to be done on the part of the seller, until that is done the property does not pass."

Austen *vs.* Craven, 4 Taunt., 643, 1811, Mansfield, J., said:

"The defendants contracted to sell to K. 50 hogsheads of sugar, called double loaves, at 100*s* per cwt. to be delivered, free, on board a British ship. K. sold to the plaintiff by the same description, and the defendants assented to the re-sale. The sugar not having been delivered or weighed, held that the plaintiff could not recover in trover against the defendants, the first vendors."

Logan *vs.* Mesurier, 6 Moore's P. C., 116—1847. Present, Lord Brougham, Lord Langdale, Lord Campbell, Dr. Lushton, and Hon. T. Pemberton Leigh.

Contract.

"Hart, Logan & Co., of Montreal, sell, and Le Mesurier, Routh & Co., of the same place, buy, a quantity of red pine timber, the property of Thomas Durrell, of Hall, L. C., but under the contract of the seller, now lying above the rapids, near the Chaudiere Falls, Ottawa River, and stated by the said Thomas Durrell to consist of 1,391 pieces, measuring 50,000 feet, more or less, deliverable at Quebec on or before the 15th June, next, and payable by the purchasers' promissory notes, at ninety days from this date, at the rate of 9½d. per foot, measured off. Should the quantity turn out more than above stated, the surplus to be paid for by the purchasers at 9½d. per foot on delivery; and should it fall short, the difference to be refunded by the sellers.

"Signed in duplicate. Montreal, 3 Dec., 1834.

"HART, LOGAN & CO.

"LE MESURIER, ROUTH & CO.

"To be delivered at M. B. Farlin's Booms, at Sillery Cove, Quebec."

On 5th Dec., 1834, Le Mesurier & Co. delivered their promissory notes at 90 days, to Logan & Co., for £1,979 3s. 4d. The timber was not delivered on the 15th June; but on the 19th, late in the day, a raft arrived at Sillery Cove, at Farlin's Boom. But the boom there was full. It was removed a short distance and properly secured. That night the raft was broken up by a storm and the timber dispersed, and most of it wholly lost. The buyers gathered up all they could.

Le Mesurier & Co. paid the notes at maturity, and brought suit in the Court of King's Bench at Montreal to recover the amount of the notes paid by them, and also £400 damages for non-delivery of the timber.

In the court below there was a judgment for Logan & Co., that the property had passed, &c.

There was an appeal to the Court of Appeals for Lower Canada, and judgment reversed, &c.

Lord Brougham, after stating the facts, says:

"While on the other hand the seller is to retain possession, to carry the chattel to a certain place, there to deliver it at a certain time, and to make the measurement before delivery. But, taking the whole of these terms together, it appears to us THAT UNTIL THE MEASUREMENT AND DELIVERY WAS MADE THE SALE WAS NOT COMPLETE, *there being nothing in the terms to show an intention that the property should pass before measurement;* but, on the contrary, the intention rather appearing to be that the transfer should be postponed until the measurement at the delivery."

CASES WHERE PROPERTY PASSES.

Turley *vs.* Bates, 2 H. & C., 200:

The sale was for an entire heap of fire clay at 2s. per ton. The buyer was to cart it away, and have it weighed at certain scales *en route* of hauling.

It was held the property had passed by the contract.

Benjn. on Sales, § 332, p. 264.

Kershaw *vs.* Ogden, 34 L. J. Ex., 159, and 3 H. & C., 717.

Benjn. on Sales, § 333, p. 265; §§ 313 to 317.

Gilmour *vs.* Supple, 6 Moore P. C., 551:

"Sold Allan, Gilmour & Co., a raft of timber, now at Carange, containing white and red pine, the quantity, about 71,000 feet, to be delivered at Indian Cove Booms. Price for the whole, 7½d. per foot."

Raft was delivered to the buyer's servant at the appointed place, and broken up by a storm the same night.

The property had passed, *because it was found the raft had been measured before delivery* by a public surveyor.

Crofoot *vs.* Bennett, 2 Comst., (N. Y.,) 258.

Outwater *vs.* Dodge, 7 Cowen, 85—1827. Sale of fish to be inspected by buyer. This was not done. Fish delivered and suit by vendor for the price. He must declare on the special contract, &c. The property did not pass.

Hutchinson *vs.* Hunter, 7 Barr, 140—1847. Sale of 100 barrels molasses. The buyer resold to C and offered to turn them out and gauge them. The goods were destroyed by fire. B cannot recover from C the price. The property did not pass. The old English cases I have referred to are cited and commented on, and the principles of those cases adopted.

Woods *vs.* McGee, 7 Ohio, 467, S. P.

Barrett *vs.* Goddard, 3 Mason, 107—1822. Trover to recover 41 bales of cotton. Goddard shipped from New Orleans 82 bales of cotton, numbered from 1 to 82, respectively. He employed Coffin to sell. He sold to Perrin 41 bales, the even numbers on credit of six months. The odd numbers he sold to Ballard. At this time the whole 82 bales remained in Goddard's warehouse, and by agreement to remain there as long as buyer wished. Ballard gave his note for the amount at 8 months, 7th February, 1822. The broker gave him a bill of parcels and receipts by note, March 15, 1822. In June, Perrin removed his cotton. On the 25th May Ballard failed, and assigned the cotton to Barrett and others. Goddard gave notice to Ballard and to Barrett that he would not deliver the cotton unless the note (which was not then due) was paid or secured.

The note became due before the trial, and the maker remained insolvent. The defendant sold the 41 bales of cotton without the consent of Ballard or Barrett. On the 27th May, day of demand, the value was $3,011.60.

Under the instruction of the court the jury found for the plaintiff, and this was a motion to set aside this verdict.

Story J. reviews all these English authorities and adopts the rule laid down in cases cited:

Hanson *vs.* Meyer, 6 East., 614.
Austen *vs.* Craven, 4 Taunt, 643.
White *vs.* Wilks, 5 id., 176.

Prescott *vs.* Locke, 51 N. H., 94, 1871:

1st Count. Assumpsit for 9,130 spokes, at $40 M, $365.20. 2d Count. For spokes bargained and sold. The plaintiff had a saw mill in Exeter. Defendants were carriage wheel builders at Amesbury, Massachusetts. In October, 1868, the parties agreed that defendants would take from plaintiffs all the walnut spokes they would make at their mill, in lots of about 10,000 each, subject to defendants' selection. Several lots had been counted out, selected by defendants, received and paid for. This lot was counted out on a separate pile by plaintiffs; had not been counted or culled by defendants. They were consumed by fire, and the questions were, whether the property had passed, and whether there had been such actual or constructive delivery as to satisfy the statute of frauds.

It was held, as the defendants were to count and cull them, the property did not pass, and plaintiff could not recover.

HAD ELGEE THE RIGHT OF RESCISSION OF NUTT'S CONTRACT.

See Benjamin on Sales, §764.

Where the property has passed there can be no rescission by the vendor.

1 Queen's Bench, 395, Martindale *vs.* Smith.
Tarling *vs.* Baxter, 6 B. and C., 360.
Dixon *vs.* Yates, 5 B. and Ad., 313.
See Blackburn's Statement of Law, p. 325.
Benj. on Sales, §782, p. 679.
See old case of Ld. Holt, 1 Salk., 113, cited by Ld. Ellenborough in Hinde *vs.* Whitehouse, 7 East., 571, and by Littledale, J., in Bloxam *vs.* Sanders, 4 B. and C., 945.

The review of the authorities will show most conclusively that Elgee could not rescind the contract of sale without the consent of Holmes or Nutt.

Least of all could he do so without notice to Nutt or Holmes.

THE SAME LAW PREVAILS IN LOUISIANA.

C. C., Art. 2539: "If the buyer does not pay the price the seller may sue for the dissolution of the sale."

17 La. Rep., 311; 12 A., 699; 13 An., 332; 14 A., 342; 15 A., 256.

Before he can sell he must give notice.

Art. 2529. "On failure of the buyer to pay the price the seller may compel him to do it by offering to deliver the thing to him, if that has not already been done."

"If no stipulations, buyer must pay at the time and place where the delivery is to be made."

THE LAW UNDER CIVIL CODE AND DECISIONS OF SUPREME COURT OF LOUISIANA.

ART. 1912. "Although the contract contains an obligation to deliver, yet if it be one that does not purport a transfer of property, the thing is always at the risk of the obligor; provided there be no specific agreement to the contrary."

ART. 1916. "With respect to personal effects, although by the rule referred to in the two last preceding articles the consent to transfer vests the property in the obligee, yet this effect is strictly confined to the parties until actual delivery of the object. If the vendor being in possession should, by a second contract, transfer the property to another person, who gets the possession before the first obligee, the last transferee is considered the proprietor; provided the contract be made on his part *bona fide* and without notice of the former contract." (See 1914, 1915, and 1917.)

ART. 2456. "In all cases where the thing sold remains in the possession of the seller, because he has reserved to him-

self a usufruct, or retains possession by a precarious title, there is reason to presume that the sale is simulated, and with respect to third persons the parties must produce proof that they are acting in good faith and establish the reality of the sale."

ART. 2243. "Sales or exchanges of personal property are void against *bona fide* purchasers or creditors, unless possession is given before such *bona fide* purchaser acquires his right by possession. What is a delivery of possession depends on the nature of the property; it may be constructive or actual; the delivery of the key of a store in which it is contained, or an order accepted by the person in whose possession it is held, if at the order of the vendor, is good evidence of delivery."

ART. 2431. "The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser, with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered nor the payment made."

ART. 2433. "When goods, produce, or other objects are not sold in lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller until they be weighed, counted, or measured; but the buyer may require either the delivery of them or damages, if any be, for the same, in case of non-execution of the contract."

ART. 2434. "If, on the contrary, the goods, produce, or other objects have been sold in a lump, the sale is perfect, though these objects may not have been weighed, counted, or measured."

ART. 2452. "The tradition or delivery is the transferring the thing sold into the power and possession of the buyer."

ART. 2453. "The tradition or delivery of moveable effects takes place either by their real tradition or by the delivery of the keys of the building in which they are kept, or even by the bare consent of the parties, if the things cannot be transported at the time of sale, or if the purchaser had them already in his possession under another title."

DECISIONS BY SUPREME COURT OF LOUISIANA UNDER THESE ARTICLES OF THE CODE.

A sale is perfect between the parties as soon as they agree as to the thing to be sold and the price to be paid.

As to third persons, the property does not pass till delivery.

Cook *vs.* West, 3 Robinson, 331—C. C., 2433.

Where there is no delivery, the contract of sale is void as to subsequent purchasers.

Barrett *vs.* Creditors, 12 Robinson, 470.

A sale, as between the parties, is complete as soon as there is an agreement as to the thing sold and the price to be paid.

A promise to sell amounts to a sale, where there exists a reciprocal consent of both parties as to the thing and the price.

See also 5 An., 656; 6 *Id.*, 26; 7 *Id.*, 70.

Thompson *vs.* Mylne, 11 Robinson, 349.

Contracts in regard to personal property are regulated by the *lex loci* of the vendor.

The *situs* subjects it as to remedy to the *lex loci rei sitae.*

See Knox *vs.* Payne, 13 A., 80.

Where cotton was stored at a press in New Orleans, vendor gave an order to pressman for its delivery to buyer, but before the cotton was turned out, classed, and weighed, destroyed. The sale is incomplete. (C. C., 2433; Larue *vs.* Rugely, 10 La. An., 242.)

Goodwin *vs.* Pritchard, 10 La. An., 249, was a sale on a plantation, and similar in the leading and controlling facts.

The judge in his opinion, on page 250, says:

"Our code has by positive provisions set at rest discussion, both as to the general rule and its exceptions."

In Lambeth *vs.* Wells, 12 Rob., 51, a vendor who agreed to sell cotton *by weight*, pointed it out, and saying, he then delivered it to the vendee. The cotton was unbaled. A part was afterwards baled and marked with the initials of the vendee, and hauled to the landing at the river, but none of it was weighed.

It was seized by a creditor of the vendor on execution.

Held that the sale was void as to third parties.

Sales or changes of personal property are void against *bona fide* purchasers and creditors unless possession is given before such *bona fide* purchaser or creditor acquire his right to the possession.

McCloskey *vs.* Central Bank, 16 La., 284.

Where a lot of cotton is sold by weight, property does not pass till it is weighed.

Where vendor has re-sold to another party the sale as to such third party is incomplete until actual delivery. Where vendor re-sold, second vendee, if *bona fide*, has better title.

Duncan *vs.* Holt, 21 An., 235.

And the fact that vendor sold the cotton to another party is incompatible with a delivery.

S. C., *Id.*

A sells to B 100 bales of cotton of crop then on his plantation.

The cotton was to be delivered at a designated landing. Suit by B to enforce performance, by writ of sequestration, and a *fi fa* against vendor.

Held the property did not pass, and the *fi fa* would prevail.

Abat *vs.* Atkinson, 21 La. An., 414.

The case of Campbell *vs.* Penn, (7 La. An. Rep., 371,) is made upon this article of the code, (2433,) and shows that the rule of the English and American courts prevails there as well.

That was a sale of cotton. A part of it had been weighed and delivered by the broker to the vendee, but the rest had not passed the scales when the vendee absconded; and it was held there was no title passed to the vendee in the part not weighed. A delivery of the whole *in block* completes the sale, though the articles be not measured, counted, or weighed; but it must be an actual, and not a constructive or symbolical delivery—an actual change of possession.

Parmele *vs.* McLaughlin, 9 La. A. Rep., 439.

CASES UNDER NON-INTERCOURSE LAWS.

REFORM, 3 Wallace, 617—

Vessel and cargo procuring cotton-seed by authority of Secretary of Interior, under act February 13, 1862, condemned because THE PRESIDENT ALONE COULD LICENSE ANY INTERCOURSE WITH THE ENEMY under the act of July 13, 1861.

THE SEA LION, 5 Wall., 630—

The President alone had the right to license intercourse.

In this case a license to bring the cotton out of Mobile by a Treasury agent, and approved by Rear-Admiral Farragut, commanding the blockade squadron off Mobile.

Also, (p. 647,) the military permit issued by General Banks void.

Ouachita Cotton, 6 Wall., 521—

The claimant resided in New Orleans, and had Treasury permits and military authority, and purchased outside in Louisiana. Part of property was bought directly from Confederate cotton agent

The Reform and Sea Lion cases are affirmed. That the President alone could license the intercourse—military and Treasury permits nullities—New Orleans Union territory after 6 May, 1862.

COPPELL *vs.* HALL, 7 Wallace, 542—

1st. Even the vice-consul of a neutral power at New Or-

leans could not, after the 6th May, 1862, trade across the lines.

2d. The general orders of the military commander, of March 7, 1863, could give no validity to such intercourse.

But it is insisted that it was not illegal to make the contract, if they did not attempt to move the cotton.

Mr. Justice Swayne (on page 558) says of this contract, attempted to be enforced after the war:

"In such case there can be no waiver. The defence is allowed, not for the sake of the defendant, but of the law itself. The maxim, *ex dolo malo non oritur actio*, is limited by no such qualification. The proposition to the contrary strikes us as hardly worthy of serious refutation. Whenever the illegality appears, whether the evidence comes from the one side or the other, the disclosure is fatal to the case. No consent of the defendant can neutralize its effect." "Wherever the contamination reaches it destroys." "The law will not lend its support to a claim founded upon its violation."

United States *vs.* Lane, 8 Wallace, 185—

That even under act of July 2, 1864, the Treasury agent, military commander, &c., could not authorize intercourse.

Grossmayer, 9 Wallace, 72—

Grossmayer resided in New York; Einstein, his debtor, in Macon, Georgia. When the war broke out they corresponded by means of a person who passed through the lines. G. requested E. to remit him amount due in sterling exchange, or invest it in cotton for him. Einstein did the latter, and informed G. of it. G. expressed himself satisfied with the arrangement. It was sent as Grossmayer's to Savannah, to Abrams, and he stored it in Einstein's name. It remained till Sherman's army came; was seized, sold, net proceeds paid into Treasury, and suit under captured and abandoned property act by Grossmayer.

The authorization of Einstein as agent for him during the war was unlawful. It was void, incapable of ratification.

Montgomery's case, 15 Wall., 395—

There M. lived in New Orleans; Leo. Johnson lived in La Fourche parish, Louisiana. Burbridge was Johnson's agent before the war, and had made advances on his (Johnsons') crops of 1860 and 1861, and undertook to sell them to Montgomery, it consisting of sugar and molasses in the warehouse of Johnson, in his purgeries *on his plantation in La Fourche.* The sugar there as here, was to be delivered in New Orleans, and there weighed and paid for.

United States *vs.* Lapene, 17 Wall., 601—

There Lapene and Ferree appointed one Avergno their agent, before the capture of New Orleans, to go out and buy cotton for them. While gone, the city was taken by the Union troops. After this the agent bought the cotton. It remained in rebel territory till April or May, 1863, when it was captured and sold; Lapene sued for the proceeds.

HELD TRADING *with the enemy.*

There it was declared by the President's proclamation as excepted, 12 May, 1864, and opened to trade same day.

12 Stat., 1263.

By proclamation January 1, 1863, certain parishes and city of New Orleans excepted. (12 Stat., 1268–9.) April 2, 1863, exceptions, except New Orleans, revoked.

13 Stat., 730–1.

Cutner *vs.* The United States, 17 Wall., 517:

This case decides that in March, 1865, the city of Savannah was still disloyal territory, and intercourse should "*cease and be unlawful so long as such condition of hostility shall continue.*" Act July 13, 1851, 12 Stat., p. 257.

Ensly *vs.* The United States, 9 Court of Claims, 11:

There the owner lived in Memphis. Sent an agent to

Mobile, sold his slaves there and invested it in cotton, which was captured by the United States and sold. He brought suit for the proceeds. Memphis at this time was held by the military forces of the United States. Decided by Supreme Court without any opinion.

It is the only case that gives the least color to the argument in favor of the ruling of the Court of Claims in the Nutt Case.

If this case and the Cutner case are both to stand, then it follows that an inhabitant of a rebel State, *living within the Union lines of occupation*, but outside of that proclaimed as reclaimed territory, *could neither sell to nor buy from any person within either the Union or rebel lines?*

THEREFORE SUCH INHABITANTS ARE INTERDICTED FROM BUYING OR SELLING ANYTHING from or to any person whatsoever.

That is, they are prohibited from dealing with citizens of Union territory because they are citizens of rebel territory. And from the same intercourse with rebels, because they are inhabitants of Union territory.

I submit with great respect to those who insist upon this view that it involves a direct contradiction, if not an absurdity.

Hamilton *vs.* Dillon, (not yet reported.)

But I am relieved from pursuing this argument further by the full and exhaustive opinion of Mr. Justice Bradley at the present term :

"*The position that Nashville, being within the national lines, was not hostile territory in* 1863 *and* 1864, *and therefore not within the prohibition of commercial intercourse contained in the act of* 1861, *is not tenable. The State of Tennessee was named in the President's proclamation as one of the States in insurrection; and, as we have seen, the exceptions made in his first proclamation in favor of maintaining commercial intercourse with parts of such States remaining loyal, or occupied by the forces of the United States, were abrogated by the proclamation of April* 2*d*, 1863, *except as to West Virginia and certain specified ports.* There was nothing in this act of

the President repugnant to, or not in conformity with, the act of 1861. 'This revocation,' as remarked by this court in the case of the Venice, (2 Wall., 278,) 'merely brought all parts of the insurgent States under the special licensing power of the President, conferred by the act of July 13, 1861.' *The act gave the President power, where a State or part of a State remained irreclaimable, to declare that the inhabitants of such State, or any section or part thereof where such insurrection existed, were in a state of insurrection. This power clearly gave the President a discretion to declare an entire State, where the insurrection was persisted in, or only a hostile district therein, in a state of insurrection. Finding the attempt to discriminate between the different parts of a State (except in peculiar cases) impracticable, he abandoned the attempt, and declared the entire States in a state of insurrection. He clearly had authority so to do, more especially as the insurrection was supported by State organizations and the actual State authorities. Thenceforth the war became a well-defined territorial war, and was in great measure conducted as such.* The further provision of the act, that all commercial intercourse with the insurrectionary districts should cease 'so long as such condition of hostility shall continue,' could not be construed as allowing such intercourse to be resumed by individuals at will, as fast and as far as our armies succeeded in occupying insurgent territory. The 'condition of hostility' remained impressed upon the insurrectionary districts until it was authoritatively removed by the proclamation of the President at the close of the war."

"But it is unnecessary to pursue this subject. We have frequently held that the civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President; and nothing but the apparent earnestness with which the point has been urged would have led to a further discussion of the point. (See Mrs. Alexander's Cotton, 2 Wall, 404; Coppell *vs.* Hall, 7 Wall., 542; McKee *vs.* United States, 8 Wall., 163; and numerous other cases.)"

The case of The Venice, (2 Wall., 258,) is ruled upon the proclamation of August 16, 1861. New Orleans was held to be permanently occupied, on and after 6th May, 1862, the date of General Butler's proclamation.

The port was also opened, and trade regulations established, by President and Secretary of the Treasury on the 12th May, 1862, (12 Stat., 1263 and 4; S. P. Circassian, *id.*, 135.)

McKee *vs.* United States, (8 Wall., 163,) is to the same effect.

The cases cited show that citizens of New Orleans, after its recognition as being permanently occupied and controlled by the United States, could not trade with citizens of even the same disloyal State outside the city. And so on the other hand, citizens of Savannah and Charleston, after the revocation of the exceptions by the proclamation of April 2, 1863, while they were fully and permanently occupied by the Union forces, are held to be prohibited from intercourse with citizens of loyal States.

But no case holds, that a citizen of New Orleans could not trade with a citizen of New York after May 6, 1862, under the restrictions of the customs and military regulations.

No case but Ensly's holds that after April 2, 1863, a citizen of a town or country occupied by the Union forces, but not excepted by proclamation or otherwise, could not trade with rebel fellow-citizens, if not contraband of war, or violative of the military regulations and restrictions.

From this review of these cases it appears to me that we have clearly shown—

1st. That the Lobdell and Woodruff and Bouchard contracts are clearly within the interdict of the statute, and that that "sting of disability" destroys them.

2d. That Nutt and Elgee, both residing within the rebel territory at the time, had the right to make the contract of the 8th October, 1863, and that there is nothing in it manifesting any design to violate this or any other act.

JOS. CASEY,
Counsel for Mrs. Nutt.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 223.

JULIA A. NUTT, Ex'x of HALLER NUTT, Deceased,

vs.

THE UNITED STATES ET AL.

BRIEF IN REPLY.

BY

JOSEPH CASEY,
Attorney for Mrs. Nutt.

Judd & Detweiler, Printers.

Supreme Court of the United States.

OCTOBER TERM, 1874.

No. 223.

JULIA A. NUTT, Ex'x of HALLER NUTT, Deceased,

vs.

THE UNITED STATES.

Appeal from Court of Claims.

BRIEF IN REPLY.

On the part of Woodruff & Bouchard it is claimed that Lobdell's contract with Elgee & Chambers, and the possession of Morris, the agent, operated to transfer both the title in and possession of the cotton to Lobdell and to them. Nothing could be wider of the mark. Both agreements on their faces are but executory contracts of sale, and not completed or perfected transfers. And for the reason that certain things remained to be done to complete the sale. 1st, as to Lobdell's.

1st. The cotton was to be delivered by the vendor at Fort Adams.

2d. There it was to be weighed to ascertain the price before delivery.

3d. Simultaneous with delivery it was to be paid for by Lobdell.

All these were conditions precedent to the passing of the property and title. Never having been either performed or performance tendered, he never had a spark or shadow of title. And it is only the owner of the property who can maintain a suit under the captured and abandoned property acts.

The law on this subject is fully treated in Benjamin on Sales, Am. Ed., § 318, *et seq.*, and where both the English and American authorities are cited and reviewed. The text states two rules.

1st. "Where by the agreement the vendor is to do any thing to the goods for the purpose of putting them into that state in which the purchaser is bound to accept them. * * * This is a condition precedent."

2ndly. "Where any thing remains to be done to the goods for the purpose of ascertaining the price, as by weighing, measuring, or testing the goods, where the price is to depend on the quantity or quality of the goods, the performance of these things shall be a condition precedent to a transfer of the property, though the individual goods be ascertained, and they are in the state in which they ought to be accepted."

These rules, says the American editor, in note, on page 247, have been generally adopted and followed in the American courts.

He cites Mr. Justice Story, Mr. Chancellor Kent, Mr. Chief Justice Shaw, and many other eminent judges.

This sale contained other conditions precedent:

1st. Lobdell was to furnish bagging and twine to bale the unginned cotton.

2d. Elgee & Chambers to gin and bale it and put it in a condition for delivery, and deliver it at Fort Adams.

No part of these conditions were ever performed.

Hanson *vs.* Meyers, 6 East, 614, decided by Lord Ellenborough, was a noted case under these rules. It was followed fully by Mr. Justice Story in Barrett *vs.* Goddard, 3 Mason, 107.

In absolute sales, where there is no credit, the buyer is entitled to the goods on payment of the stipulated price, and not otherwise. (2 Kent, 492.)

Conway *vs.* Bush, 4 Barb., (N. Y.,) 564, makes the true distinction in such cases. Payment or tender is a condition precedent. Vendee by the bargain may acquire the right of property, but he can only come to the fruition of that right, the possession of the goods, by paying the price.

Poth. Cont. of Sale, §§ 309 and 310.

Prescott *vs.* Locke, 51 N. H. Rep., 102.

Where in a sale of spokes they were separated by seller and counted out on a pile, but were to be counted by the buyer, yet the property did not pass.

It is true this rule may be changed by express agreement, *but the language used for that purpose must be unequivocal.*

Russell *vs.* Carrington, 42 New York Rep., 118.

Even where all the goods contained in a magazine or granary be sold by weight or measure, weighing or measuring is necessary in such case to pass the title.

Poth. Cont. of Sale, §§ 309 and 310; 51 N. H., Rep. 51.

Leonard *vs.* Davis, 1 Black, 476—

Was a sale on credit, and everything done and the title passed.

The clause in the agreement that the cotton should be at the risk of Lobdell is perfectly consonant and consistent with this view; because, if the parties intended that it should be a completed sale and the property pass, then this provision was entirely superfluous and unnecessary.

Zachary *vs.* Furnell, 2 Campb., 240.

Rugg *vs.* Minett, 11 East., 210.
Simmons *vs.* Swift, 5 B. and C., 857.
Logan *vs.* Messurier, 6 Moores, P. C., 116.
Boswell *vs.* Kilburn, 15 *id.*, 309.

It is supposed that the law of Louisiana is different. This is a misapprehension; and the authorities cited in the brief do not sustain the position.

The Louisiana Civil Code, article 2433, provides:

"When goods, produce, or other objects are not sold in a lump, but by weight, by tale, or by measure, the sale is not perfect, inasmuch as the things so sold are at the risk of the seller until they be weighed, counted, or measured; but the buyer may require either delivery of them or damages, if any be for the same, in case of non-execution of the contract."

The case of Campbell *vs.* Penn, (7 La. An. Rep., 371,) is made upon this article of the code, and shows that the rule of the English and American courts prevails there as well. That was a sale of cotton. A part of it had been weighed and delivered by the broker to the vendee, but the rest had not passed the scales when the vendee absconded; and it was held there was no title passed to the vendee in the part not weighed. A delivery of the whole *in block* completes the sale, though the articles be not measured, counted or weighed; but it must be an actual, and not a constructive or symbolical delivery—an actual change of possession. Parmele *vs.* McLaughlin, 9 La. Rep., 439.

Did Nutt's contract convey to him the property in the cotton? Was he the owner of it when seized?

It was a present sale, at a stipulated price, of a designated lot of cotton, payable at a future time. It was a completed, perfected, unconditional sale.

Chitty on Contracts (p. 336) says:

"As to the change of property effected by such a contract, it is clear that by the law of England the sale of a specific chattel passes the property without delivery."

Benjamin on Sales, (Am. Ed., § 313 to 317,) and authorities cited. In § 315 it is shown from citations both in the text and the American Ed.'s Notes, that Noy's maxim, "unless the money be paid presently, unless day be expressly given," is not the modern law, either in England or America.

In Gilmour *vs.* Supple, (11 Moore's P. C., 566,) Sir Cresswell Creswell says:

"By the law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer, and a right to the price in the seller, unless it can be shown such was not the intention of the parties."

And in the Calcutta Company *vs.* De Mattos, (32 L. J. Q. B., 322–328,) Mr. Justice Blackburn adopts this as a correct statement of the law.

And also per Shaw, C. J., Arnold *vs.* Delano, 4 Cush., 40; Chapman J. Ropes *vs.* Lane, 9 Allen, 502; Gale *vs.* Burnell, 7 Queen's Bench, 850; Cortland *vs.* Morrison, 32 Maine, 190; Poth. Cont. of Sale, by Cush., § 308 to 313; 2 Kent, (5th Ed.,) 522.

Contract may be executory, and yet the property pass. It is a question of intention. This was evidently a present sale of the 2,100 bales, at $75 per bale, payable in Liverpool, because nothing remained to be done either by the seller or buyer, and the property was designated and specified.

Austin *vs.* Craven 4 Taunt., 644.
Outwater *vs.* Dodge, 7 Cowen, 85.
Woods *vs.* McGee, 7 Ohio, 128.
Riddle *vs.* Varnum, 20 Pick., 280.
Hunter *vs.* Hutchinson, 7 Barr., 140.

Wing *vs.* Stark, 11 Shepley, 366.
Shindler *vs.* Houston, 3 Denio R., 48.
Chitty on Cont., 9th American Ed., pp. 336 and 337, and notes.

In such case, it is a question of intention under all the facts. This has not been found by the Court of Claims.
Riddle *vs.* Varnum, 20 Pick., 283.
Hawes *vs.* Watson, 2 Barn. & C., 540.
Downer *vs.* Thompson, 6 Hill, 208.
Dennis *vs.* Alexander, 3 Barr Rep., 50.

DID THE LOBDELL, ELGEE, & BOUCHARD—LOBDELL CONTRACTS—VIOLATE THE NON-INTERCOURSE LAWS?

The Court of Claims finds that Lobdell, Elgee, and Chambers all resided in rebel territory when the contract was made, and that the cotton was in same predicament. (Record, p. 22.)

The contract provides, and the Brief of Mr. Corwine, p. 7, admits, that the cotton was to be delivered at New Orleans, to Da Silva & Co., and paid for there, and that in the agreement of March 15, 1864, of Lobdell with Woodruff and Bouchard, the cotton was to be delivered in New Orleans, and says: "*Thus both agreements were to be consummated in New Orleans, where the cotton was to be weighed and delivered.*"

Now, the written contract designates Lobdell as a resident of West Baton Rouge parish, in the State of Louisiana. The court finds that he was in July, 1863, resident there. He himself was a witness in the case, and swore that he resided there till in June, 1864, and then went temporarily to New York State, and then settled permanently in Wisconsin. *He did not pretend that he ever lived in New Orleans.*

The fact is, returned contrary to the written muniment of title, under which the party claims, and is a palpable contradiction of it, and to the solemn oath of the party whose place of residence is in dispute.

But it is admitted that the first contract with Elgee was to be consummated in New Orleans, and so it expressly provides. (See Mr. Corwine's Brief, p. 7.)

If this be so, it was a most direct and palpable infraction of the non-intercourse laws, or an agreement to set them at defiance.

It was an agreement to do that which the law forbade—to sell and buy the products of the insurrectionary territory, and ship them to loyal territory, in violation of those laws. According to my brother Corwine's own statement of it, the first contract was illegal, and therefore utterly void for every purpose.

To carry out the contract as it was made by the parties, and is now construed by the counsel of the purchaser, involved a direct and palpable violation of the provisions of the statute, and the general rules and laws of war as well, and this utterly destroys it.

But let us now turn to the agreement between Bouchard and Lobdell, made on the 15th March, 1864.

For the sake of the argument let it be admitted that both parties lived in New Orleans and made the contract there. That Woodruff and Bouchard, in pursuance of their purchase, sent an agent up to Wilkinson county, Miss., where the cotton was stored, gave notice to Lobdell's agent of the transfer to them, and appointed Morris and Ventris as their agents to hold it for them.

See Mr. Corwine's Brief, p. 2 and p. 7.

So Bouchard's counsel state the facts, and ask the Court of Claims to find them. (Record, p. 26. Also, Petition, p. 1.)

Thus their own statement of the facts makes the case the very *fac simile* of Grosmayer's case and Montgomery's case, and a more direct and flagrant violation of the non-intercourse laws than either of these cases involved.

If this sale can be sustained, it was an easy thing to transfer the ownership of every bale of cotton or hogshead

of sugar in the Confederacy to loyal men, and thus defeat at same time non-intercourse and confiscation laws.

In the case of Coppel *vs.* Hall, 7 Wall., 542, the whole doctrine in the very light in which this case presents itself, was exhaustively treated by Mr. Justice Swayne. In that case there was a military permit by Gen'l Butler; there was none here.

In that case the property was never seized by the United States. Here it was, and that while the war was still flagrant. While that and the Montgomery and Grosmayer cases stand, it is impossible to prop up this judgment.

WAS THE SALE TO NUTT A BREACH OF THE NON-INTERCOURSE ACTS?

Both the counsel for Elgee's executrix, and for Bouchard assume this to be so, and place the invalidity of the contract on that ground alone. This position assumed by them is based upon the supposition that Natchez, being occupied and controlled by the Union forces at the time, became Union territory.

The case of Hamilton *vs.* Dillon, disposes so fully of this assumption that nothing further need be said upon it. The following paragraphs from Mr. Justice Bradley's opinion disposes fully of this whole question:

"*The position that Nashville, being within the national lines, was not hostile territory in* 1863 *and* 1864, *and therefore not within the prohibition of commercial intercourse contained in the act of* 1861, *is not tenable. The State of Tennessee was named in the President's proclamation as one of the States in insurrection; and, as we have seen, the exceptions made in his first proclamation in favor of maintaining commercial intercourse with parts of such States remaining loyal, or occupied by the forces of the United States, were abrogated by the proclamation of April 2d,* 1863, *except as to West Virginia and certain specified ports.* There was nothing in this action of the President repugnant to, or not in conformity with, the act of 1861. 'This revocation,' as remarked by this court in the case of the

Venice, (2 Wall., 278,) 'merely brought all parts of the insurgent States under the special licensing power of the President, conferred by the act of July 13, 1861.' *The act gave the President power, where a State or part of a State remained irreclaimable, to declare that the inhabitants of such State, or any section or part thereof where such insurrection existed, were in a state of insurrection. This power clearly gave the President a discretion to declare an entire State, where the insurrection was persisted in, or only a hostile district therein, in a state of insurrection. Finding the attempt to discriminate between the different parts of a State (except in peculiar cases) impracticable, he abandoned the attempt, and declared the entire States in a state of insurrection. He clearly had authority so to do, more especially as the insurrection was supported by State organizations and the actual State authorities. Thenceforth the war became a well-defined territorial war, and was in great measure conducted as such.* The further provision of the act, that all commercial intercourse with the insurrectionary districts should cease 'so long as such condition of hostility shall continue,' could not be construed as allowing such intercourse to be resumed by individuals at will, as fast and as far as our armies succeeded in occupying insurgent territory. The 'condition of hostility' remained impressed upon the insurrectionary districts until it was authoritatively removed by the proclamation of the President at the close of the war."

"But it is unnecessary to pursue this subject. We have frequently held that the civil war affected the status of the entire territory of the States declared to be in insurrection, except as modified by declaratory acts of Congress or proclamations of the President; and nothing but the apparent earnestness with which the point has been urged would have led to a further discussion of the point. (See Mrs. Alexander's Cotton, 2 Wall., 404; Coppell *vs.* Hall, 7 Wall., 542; McKee *vs.* United States, 8 Wall., 163; and numerous other cases.)"

The other ground upon which Elgee's executrix's attorney holds that Nutt had no title is "on general principles," p. 41 of Brief.

It would have been more satisfactory had the learned counsel stated the particular general principles upon which the sale was void, instead of misstating the facts in regard to his property, and sneering at his patriotism.

I have already shown that on "general principles," sustained by an overwhelming current of decisions, by the highest courts and most eminent judges, that the title and property to this cotton was vested in Dr. Nutt.

The declarations afterwards of Elgee, not communicated to Nutt, in reference to non-compliance with the contract, cannot affect the contract, much less work a recession of it. I know of no "general principle" that would sanction either the one or the other.

HAD THE COURT OF CLAIMS THE RIGHT AND POWER TO ENTER A JUDGMENT IN FAVOR OF LOBDELL?

If the contract between Lobdell and Elgee & Chambers is either void or did not transfer to him the property and title, he could not recover in the case, even though he were the claimant in his own name. If that be so it surely then needs no argument to prove: 1st. That he could transfer no right to Woodruff and Bouchard which he did not own or hold. 2d. That if he could not recover in his own name, he surely cannot recover in theirs; his assignees can have no stronger or better right than he had.

The attempt to justify or sustain the Lobdell judgment on the basis assumed by the Court of Claims, is evidently abandoned.

The ground taken there was that the agreement of March 15th, 1864, effected an executed and perfected sale of the cotton, which transferred the property in and title to the cotton to Woodruff & Bouchard, with a lien for the purchase money on it in Lobdell, which the general, plenary equity powers of the Court of Claims could decree to him. The ground is shifted now. Woodruff & Bouchard are mere assignees now, not owners. But their petition, filed under oath, (see Record, p. 1 and 2,) alleged they were the owners in their own right. Nor do they allege anywhere in the record that the suit, or any part of it, is prosecuted

under the right of Lobdell, or for his use. So, in their prayer for findings, (Record, p. 26,) they ask the court to find that they were the real owners of the cotton by purchase from Lobdell, and possession taken and held by them through their agents, Ventris and Morris, appointed after they bought from Lobdell. They nowhere allege their right or authority before this judgment to sue for Lobdell. It was an after-thought.

The right claimed under the assignment of May 3, 1864, is, if possible, still more flimsy. The cotton had been then taken and sent off. It was a mere claim, if anything, and as such not assignable so as to be recoverable in the name of the assignee against the United States.

No consent was given to this anomalous action of the court, except by Woodruff and Bouchard, as the record expressly shows, (p. 24.) Neither the United States, Elgee's executrix or Nutt's executrix ever agreed to anything of the kind. And if they had expressly agreed to it, their consent could not have conferred jurisdiction and power on the court, to enter a judgment in favor of a person who has no case pending, and presented no claim to them.

GENERAL BUTLER'S BRIEF.

The statement at the top of page 3 is a mere inference or argument, and is not sustained at all by the facts in the record. Woodruff & Bouchard in their amended petition, (Record, p. 1,) *claimed to be the absolute owners of the legal title to and in this cotton.*

Also page 2, where they say:

"Your petitioners further represent *that they are the owners of said cotton, and were when it was unlawfully and fraudulently seized by said Camp.*"

And previously, on page 1, they say that Camp "*took five*

hundred and eighty-two bales of the said cotton of your petitioners so situate, as aforesaid, in charge of their special agent."

So, in the finding of facts submitted by Woodruff & Bouchard's counsel (Record, pages 25, 26, 27 and 28,) there is not an intimation of the existence of such a fact in the cause. They claim as owners throughout.

If the facts are as is claimed now, in this brief, then the suit ought to have been prosecuted in the name of Lobdell, and not in the name of Woodruff & Bouchard. The idea of parties holding or claiming an executory contract for property, which does not convey the title to or property in the goods, maintaining a suit for the use of the legal owner in trespass, trover or replevin, or assumpsit for the money received for them, would be a legal anomaly, if not an absurdity.

In such case, it is too clear that the suit must be brought in the name of the legal owner. And if there are any incidental or subordinate interests in or liens upon the goods, they are to be established through this legal ownership. But the idea of an assignee of an executory contract for the sale of goods, without compliance with the conditions of the assignment, without payment of the price or any part of it, can, when those goods are seized, converted, or destroyed, maintain a suit for the use of the lawful owner, is a new discovery in legal science.

It is usual for persons interested to employ the name of the original claimant. United States *vs.* Perchman, 7 Peters, 51; United States *vs.* Patterson, 15 How., 10; United States *vs.* Sutter, 21 How., 170. But here the original claimant proposes to employ the name of the assignee.

But I regard the point as unimportant and immaterial, because, as I have already shown in this brief, Lobdell had nothing to assign except an executory contract with Elgee & Chambers, with conditions precedent annexed, which had not been performed. And for a failure to perform which Elgee, as he had a perfect legal right to do, rescinded the

contract. And that the contract was void on its face, because it could only be performed by a violation of the non-intercourse laws.

It is true that the court will judicially take notice of the general orders and proclamations of military commanders affecting the civil rights of the people of the country, but that they changed the character of the Territory, as is claimed on p. 6, is contrary to many adjudged cases. Or that the Treasury Department or a military commander could give a valid license to permit anybody to bring through the lines the products of the insurrectionary States, or "enemy's property," prior to the act of July 2, 1864, (13 Stat., 375,) has never yet been sustained by this court.

Coppell *vs.* Hall, 7 Wall., 542.
Reform, 3 Wall., 628.
U. S. *vs.* Weed, 5 Wall., 62.
Gray Jacket, 5 *id.*, 342.
The Sea Lion, 5 *id.*, 377.
Ouachita Cotton, 6 *id.*, 521.
McKee *vs.* U. States, 8 Wall., 163.

WAS LOBDELL'S CLAIM CONSOLIDATED WITH THAT OF WOODRUFF & BOUCHARD?

Lobdell brought a suit in time, No. 3,203, and prosecuted it until the 7th day of April, A. D. 1869, when it was regularly dismissed by the Court of Claims, and it never has been revived and cannot be.

This alleged consolidation was therefore impossible. It is a pure fiction. There is no syllable in the Record of any such order. Woodruff & Co.'s petitions and amended petition do not allege that they prosecute for use of Lobdell. This was required by the act of Congress (see act March 3, 1863,) reorganizing Court of Claims, (12 Stat., 765.) The act also required this should be sworn to. This Bouchard did, and in that document declared under oath that Wood-

ruff & Bouchard were the owners of the cotton, and "*the sole owners of the claim.*" (See Record, pp. 1 and 2.)

The idea of Woodruff & Bouchard suing for use of Lobdell was never dreamed of till the trial in the Court of Claims, in 1872. When pressed by the opposing parties with the objection that Woodruff & Bouchard acquired no title to, or property in, the cotton, by virtue of this agreement with Lobdell, of March 15, 1864, their counsel then ingeniously changed their grounds, and said we can recover under the assignment from Lobdell, of May 3, 1864. No order was made; no amendment of the petition offered or allowed. The record is a blank, except in the finding of facts returned. It is said (Record, p. 24:)

"C. V. Woodruff & Co. were authorized by Charles Lobdell to prosecute this suit for his benefit, and C. V. Woodruff & Co. agreed in open court, by their counsel, that the court should apportion the fund in suit among the parties found to be equitably interested therein."

Such an order, if even made in 1872, introducing a new title, a new cause of action, and a new party, would have been a nullity. It was equivalent to bringing a new suit; and for this there was no jurisdiction. The jurisdictional limitation under act of March 12, 1863, expired on 20th of August, 1868, as the Haycraft case fully decides, and every authority cited by General Butler, and applied with so much force in his brief, on pages 12, 13 and 14, against the amendments in the Elgee case, are destructive of his own positions here.

The name of a new party and his claim cannot be introduced after Limitation of Statute has run. United States *vs.* Patterson, 15 How., 12; United States *vs.* Innerarity, 19 Wall., 597; Haycraft *vs.* The United States, (not yet reported.)

CONCLUSIONS.

I. Woodruff & Bouchard cannot recover because they

are not the owners of the cotton or its proceeds. No title to or property in the cotton ever passed to or vested in them. Their contract was void, being in violation of the non-intercourse laws. The foundation, title and parties to their suit could not be changed in 1872, and was not so done in fact.

II. Lobdell cannot recover because he is not in court in any suit, either directly or for his use. His contract was abandoned by him, and rescinded by Elgee and Chambers. It was also void, because it could only be performed or enforced through a violation of the non-intercourse laws.

III. The United States have no other interest in the net proceeds, than as trustee for the true owner entitled to them.

IV. The agreement of October 8, 1863, by Elgee & Chambers, conveyed the property in, and title to, the cotton to Haller Nutt. As *owner* he is entitled to the proceeds of the property seized. Elgee's estate is entitled to a lien for the unpaid purchase money and interest.

V. That the judgment should be in favor of Mrs. Nutt. At all events it should be reversed and sent back to be correctly and legally tried.

Respectfully submitted.

JOSEPH CASEY,
Counsel for Mrs. Nutt.

Supreme Court of the United States.

No. 142.—October Term, 1874.

The United States, *Appellants*, vs. C. V. Woodruff & Co., for themselves, and C. V. Woodruff & Co. who sue for the use of Charles S. Lobdell, Julia A. Nutt, Executrix, &c.	Appeal from the Court of Claims.

In Nos. 143, 166, and 223 the claimants are appellants.

Brief of Montgomery Blair, of Counsel for C. V. Woodruff & Co., who sue for the use of Charles S. Lobdell.

STATEMENT.

These cases involve the right to the proceeds of 572 bales of cotton, amounting to $381,428.27, seized by B. F. Camp, claiming to be an agent of the Treasury Department, April 2, 1864, in Mississippi. It was part of the cotton which John J. Elgee and Josiah Chambers, the previous owners, had sold to Charles S. Lobdell by a contract dated 31st July, 1863, and entered into in Mississippi, Wilkinson county.—(p. 36 of the Record.)

At the date of this contract all the parties to it were resident-citizens of Louisiana, inside of the Confederate lines.

Afterwards, Lobdell, having become a resident of New Orleans, sold his contract to Woodruff & Co. of that city, by an agreement dated at New Orleans, March 15, 1864. —(p. 36.)

These contracts were severally endorsed as follows:

"I hereby transfer all my right, title, and interest to the within contract to Messrs. Woodruff & Co., of the city of New Orleans.

"C. S. LOBDELL.

"*May* 3, 1864."

In October, 1863, Dr. Haller Nutt, residing at Natchez, then in the occupation of the federal forces, sent an agent through the lines and made a contract for this same cotton with Elgee. After Camp took the cotton in question the remaining 1,528 bales were burned. Elgee followed the cotton to St. Louis and brought an action of replevin to recover it, in which action he failed. The proceeds of the cotton were invested, pending the action, in United States bonds, and the interest thereon amounted to $91,000. Suit was brought for it in due time in the Court of Claims by Woodruff & Co.; also by Lobdell; also by the heirs of Elgee, and by the widow of Dr. Nutt. The Court of Claims held Dr. Nutt's claim to be invalid—1st, because the contract was made in violation of law; 2d, because the contract was executory; and, 3d, because Elgee had already sold the property to Lobdell.

These actions were all heard together in that court. By agreement of counsel and with the consent of the court, Lobdell's original action was consolidated with that of Woodruff & Co., and C. V. Woodruff & Co.'s action stood for themselves and for the use of Lobdell. The reason for this modification appears to have been that Woodruff & Co. had agreed to prosecute the claim for Lobdell's benefit, and this was allowed to be carried out by the court by an agreement made in open court that the court should apportion the fund between them and Lobdell in its decree according to its opinion of the equitable rights of the parties.—(p. 24.) The court allowed the Elgee heirs ten cents a pound on 2,100 bales at 500

pounds per bale, Lobdell twenty cents per pound on 572 bales, estimated at 500 pounds per bale, and the balance of the fund to Woodruff & Co., distributing the interest proportionally.

ARGUMENT.

(1) The question whether the contract between Lobdell and Elgee and Chambers was complete or executory, so elaborately and learnedly discussed in the opinion of the Court of Claims and by counsel before this court, it seems to me to be unnecessary to decide in order to sustain the judgment of that court. This, I think, results from the effect given to act of 1863 by this court and by the Court of Claims.

The third section of the act of 12th March, 1863, provides "that any person claiming to have been the owner of any such abandoned or captured property may, at any time within two years after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims, and on proof to the satisfaction of said court of his ownership of said property, of his right to the proceeds thereof, and that he has never given any aid or support to the present rebellion, to receive the residue of such proceeds *after the deduction of any purchase-money which may have been paid*, together with the expense of transportation and sale of said property and other lawful expenses attending the disposition thereof."

This language, the Court of Claims says in this case, (7 Rep., p. 613,) "entitles a claimant of captured and abandoned property to recover on proof of his '*ownership*' and his '*right to the proceeds.*' These words '*ownership*' and '*right to the proceeds*' are not technical words, and in their ordinary meaning they include all property and rights of property which may be available for pecuniary benefit. And it is manifest that ownership or property may exist in one person and rights in it in another, both

at common law and in equity, for a vendee may have the right of property in the thing sold while the vendor has the possession, and therewith a lien on the thing sold for its price. And where at the time of the capture or seizure of the property by the United States this state of things existed by force of a contract, the performance of which the seizure prevented, the respective rights of the parties under the contract can be administered only by carrying out the contract by its specific performance, and giving to each of the different claimants the benefit which the contract would have secured to him.

"And the Supreme Court have decided that under the third section of the act of 12th March, 1863, the government are trustees for loyal owners for the net proceeds of abandoned or captured property in the treasury. And if the statute *per se*, or together with any other legislation, makes the government trustees, it makes the claimant *cestuis qui trust*, and it imposes on the government the duties of trustees, and gives to claimants the rights and beneficial interests of *cestuis qui trust*, and it empowers this court to administer and enforce such duties and rights because the administration of the statute is placed here."

This certainly accords with the terms of the act itself, which expressly requires "the deduction from the proceeds of said cotton of any purchase money" which may be due from the claimant, and which may have been paid by the United States. This is a distinct recognition of the liability of the United States to pay such purchase money directly to the vendor out of the proceeds of the cotton, and authorizes the court to give them a separate judgment for the amount. And this court has again affirmed the doctrine of the Klein case giving the act this construction, at this term, in the case of Villalonga, and recognized it to be the duty of the Court of Claims to administer the fund in the treasury under that act as trust property, and pay directly to the several parties only according to their several rights. In that case the claimant

had made advances on the property, was in possession of it, and was, therefore, technically the owner to sell and receive the proceeds of the sale, and qualified to maintain an action at law for such proceeds against any other party than the United States who had seized and sold the cotton and received the purchase-money. But here this court said he could only recover his advances, because "the government constituted itself the trustee of captured and abandoned property," and hence the court held that the trust did not "*exist for the owner of a special property therein beyond the extent of his interest*," but to that extent the Court of Claims was directed to allow his claim out of the proceeds, although he was not *the owner* within the meaning of the act.

If the principle adopted by the Court of Claims in the extract from its decision above given be correct—and it seems to be sanctioned both by the terms of the act and by the decisions of this court—it is not material whether its decision at p. 620 of the opinion, that "the property in the cotton was, from the date of the contract, vested absolutely in Lobdell," be correct or not. The law does not require the claimant to be owner and entitled to claim the cotton specifically to entitle him to share in the proceeds. These proceeds constitute a trust fund, to be distributed according to the rights of the parties as they existed at the date of the seizure, whether by executed or executory contracts. The intervention of the United States has not changed these rights, and unless the courts recognize and enforce those rights in administering the trust which the government has assumed, they make the government a wrong-doer. The reason of the rule against such action by courts generally, with respect to executory chattel contracts, viz: that the party has his action for damages for the breach of his contract, (2 Story, p. 24,) does not exist here because of the intervention of the government, and, therefore, the rule does not apply; and unless the act is now construed, as this court has

heretofore decided it shall be, to authorize the distribution of the fund according to existing rights, the ends of justice might be defeated by the action of the government. It would be a plain violation of this principle to allow Elgee more of the fund than his existing contract with Lobdell entitled him to. There had been no default on Lobdell's part which entitled Elgee to rescind that contract, and if he is now paid according to its terms he receives all that he is entitled to. And this reasoning is equally applicable to the other parties, and is all-sufficient to uphold the judgment of the Court of Claims, whether its opinion on the technical question of whether the sale to Lobdell was complete or not, be correct.

For the court is not, according to its decision, required to decide who is in strictness and technically the owner of the property, that it may adjudge the whole property to him, but must recognize the various interests of the parties, and render a judgment which shall do substantial justice to all. Hence it was not necessary to decide which of the parties could claim the property specifically.

II.

LOBDELL MADE A PARTY TO WOODRUFF & CO.'S PETITION BY CONSENT.

It is urged that the judgment ought to be reversed because of the award to Lobdell, the record not showing any petition from him. The record shows that he did file a petition for himself, and that Woodruff & Co. had also filed a petition claiming the whole fund for themselves, but it was agreed in open court that the suit of Woodruff & Co. should go on for his benefit as well as for themselves, and that the court should apportion the fund between the parties, and the judgment so rendered in his behalf is sustained by the facts in proof.

It is manifest that this matter, which is made to figure so much in the discussion here, was a consent proceeding by

all parties in the court below, and an objection founded on such a proceeding ought not to be available to reverse a judgment which is just on the merits. It is true that it is not necessary to take exceptions to the proceedings of the Court of Claims, but for this reason no objection ought to be available here, which, if made below, could have been met, as that here made would have been, for certainly Lobdell's independent suit, which the record shows was filed, would not have been merged in the action carried on for his benefit and for themselves by Woodruff & Co. on which the judgment was rendered, if any objection had been made to it by the United States. In legal effect there was no change, for whilst the reports show numerous cases where actions have been brought in the Court of Claims in the name of one party to the use of another (ex. g. cases of Cutner, 17 Wall., 617; Stow, Ib., 13; Beall, 9 C. of C., 299; Rose, Ib., 504; 8 Ib., 192; Eldridge, Ib., 555) the accounting officers pay only to the *cestui qui use*.

The case stands, therefore, precisely as if the judgment stood in the name of Lobdell on his own petition. It is said in argument that no petition *for his benefit* is contained in the record sent up. This is a misconception. The record states that the parties agreed that Woodruff & Co. should prosecute for the benefit of Lobdell, and that the court should distribute the fund between these parties according to its judgment of their several rights. And the subsequent action of the court shows that Woodruff & Co.'s petition was then allowed by the court to stand as a petition for Lobdell's benefit as well as for that of Woodruff & Co., and that it was thenceforth treated by the court as Lobdell's petition also, though not formally amended. Prior thereto Woodruff & Co. had claimed the whole fund, but this agreement modified their petition into a claim for Lobdell's benefit of so much of the fund as the proof should show belonged to him. This change in the presentation of

the case by these parties did not affect the rights of the United States or of any other party to the record in the slightest degree, and whilst it has been the subject of much comment by all the counsel, not one of them has attempted to show how their clients could be prejudiced by it.

Nor is the action of the court in allowing the union of these parties assigned for error. The error assigned by the Attorney-General is the conclusion of law that Lobdell was entitled to a part of the proceeds of the cotton.

(1.) The *first* ground on which he relies to support this proposition is that Lobdell was no party to any petition pending when the judgment was rendered. This is a mistake of fact. He had become a party to the petition originally filed by Woodruff & Co. by agreement sanctioned by the court, by which agreement, instead of claiming the whole for themselves, it was stipulated that the court might allow Lobdell such part of their claim as was just. This made him a party to their petition. The exception denies a fact attested by the record and by the judgment of the court, but does not except to the manner in which the fact was brought about.

(2.) The *second* ground is that Lobdell could not authorize Woodruff & Co. to maintain suit in their name for his use. We have already cited a number of cases in which that form of procedure has been adopted in the Court of Claims, and it is practically a mere form, because the beneficiary alone is allowed to receive the money recovered. Hence the result is just as if Lobdell had continued the action in his own name. The judgment was given solely on his title, and the money will be paid only on his receipt.

(3.) The *third* objection of the Attorney-General is also taken by Mr. Butler, counsel of Woodruff & Co., at page 44 of his supplemental brief, where he says the court erred in charging the price of the 1,528 bales, at 10 cents a pound, against Woodruff & Co. "By their contract

with Lobdell," he says, "Woodruff & Co. were only to pay him at 30 cents for the cotton they 'should receive from Elgee & Chambers, and not for the whole twenty-one hundred bales.' Woodruff & Co., therefore, are only bound to pay to Lobdell the extra 20 cents per pound on the 572 bales which by the decree they do get, because on his sale they did not assume any risk, and 10 cents on the same number of bales to Elgee, and yet the court below has charged them with all the *risk* of all the 2,100 bales."

This is a mistake of fact. The court did not impose on Woodruff & Co. "all the risk of all the 2,100 bales," as between them and Lobdell, but only to the extent which Lobdell had assumed to Elgee & Chambers, and this risk they had agreed to assume in accepting the transfer of Lobdell's contract with Elgee & Chambers, and undertaking to perform its conditions. A part of that contract was that the cotton was at the risk of Lobdell, and this was one of the obligations assumed by Woodruff & Co. in accepting the transfer. Nor is it affected by the stipulation at the close of their contract with Lobdell, that "in case the quantity of cotton *should fall short*, then there shall be paid 10 cents per pound for account of said Elgee & Chambers, 20 cents per pound for account of the said C. S. Lobdell, for such amount or quantity of cotton as shall be received from said Elgee & Chambers; and it is understood by both these contracting parties that this cotton belongs to Mr. Lobdell until the consideration of 30 cents per pound for the cotton shall be paid, viz: 10 cents per pound to or for account of Elgee & Chambers, and 20 cents to or for account of said Lobdell, as aforesaid." This is only a stipulation against liability for the cotton which falls short of the weight estimated in the contract, *on delivery*, and not a stipulation against responsibility *in case of loss*. The stipulation was made in contemplation of the delivery of all the cotton, and does not differ from the contract between Elgee &

Chambers with Lobdell in that respect, for that contract provided for the payment of only so much per pound in the case of the delivery, and nothing was to be paid in that case by Lobdell to Elgee for what it fell short of the amount estimated in the contract. It was only in the case that cotton should be *lost* that both Lobdell and Woodruff & Co. took the risk of paying according to the estimated amount. There is no difference in the contracts of 31st July and 15th March on this point. Both contemplated paying only as the cotton held out in weight *on the delivery*. But this stipulation, which is common to both contracts, is not at all inconsistent with the agreement of Lobdell, assumed by Woodruff & Co. by accepting the transfer of his contract, to take the risk of the loss of the cotton, and to pay according to the estimate in the contract in case of loss.

The Attorney-General shows in his brief (p. 7) that this construction is inadmissible, because he shows that the effect of it is not only to deprive Lobdell of all share in the fund, *but to bring him in debt to Woodruff & Co.* This was certainly not the construction given to their contract when these parties submitted it to the Court of Claims and consented that the court should *divide* the fund between them equitably. Nor is the answer which the counsel for Woodruff & Co. makes, on p. 43 of his supplemental brief, to the other parties who object to the division, viz: "that Lobdell and Woodruff & Co. were consenting to that division," less conclusive upon him than upon them.

It is conceded by the Attorney-General (p. 8) that "the contract between Elgee and Lobdell did transfer the title to Lobdell," and on p. 9, that the contemplated transfer of the property to N. O. was not a violation of the laws of war, and hence that the property was vested in Lobdell at the time of the seizure thereof. As the United States, therefore, set up no right to the fund, the objection of the Attorney-General and of other parties to the division

which the admitted owner has consented to make with Woodruff & Co., with whom he had associated himself in his ownership, will not be considered here.

Nor will this court disturb the apportionment made between parties by the Court of Claims which was effected by what was confessedly a consent proceeding in that court.

III.

On the question whether the Lobdell and Elgee contract was an executed or executory contract, discussed so elaborately by other counsel, I have little to say. All the authorities are collated in a masterly manner in the American edition of Mr. Benjamin's Treatise on Sales, p. 240, and I think the weight of authority is, clearly, that the contract passed the property to Lobdell. The contract being for the entire crop, a partial payment having been made to bind the bargain, the risk being assumed by the purchaser, and the amount to be paid by him being fixed in case of loss, and the property being put (as the Court of Claims find) in his custody, leaves no doubt of the intent of the parties to pass the property, though the vendor retained a lien on it for the purchase-money, to be paid when it was weighed.

This case has all the circumstances in it that were held to be controlling by the Court of Exchequer in the case of Castle vs. Playford, stated in sec. 328 of Mr. Benjamin's treatise, with the additional fact that earnest-money was paid in this case, and no case can be found in the books where an ascertained risk on account of the property is assumed by the purchaser and the purchase-money paid, or earnest-money, in which the property has not been held to pass.

MONTGOMERY BLAIR,
Of Counsel for Lobdell.

In the Supreme Court of the United States.

No. 142.

THE UNITED STATES, APPELLANTS,

vs.

C. V. WOODRUFF, ADOLPH BOUCHARD ET ALS., APPELLEES.

Brief of Charles S. Lobdell.

Charles S. Lobdell, one of the claimants of the proceeds of the cotton involved in the above-entitled cause, filed his petition in the Court of Claims as required by the Act of Congress relating to the institution of suits for the recovery of the proceeds of captured and abandoned property. But theretofore having sold the bill of sale of Elgee & Chambers of the cotton in question to Woodruff & Co., March 15, 1864, and on May 3d of the same year having authorized the said firm to prosecute a suit for the recovery of the said proceeds for his benefit, and they agreeing to carry out the terms of the bill of sale made by Elgee and Chambers with him and to divide the balance of the proceeds after the deduction of the purchase money to be paid in accordance with the terms thereof, he consented to the withdrawal of his pretensions as set forth in his own suit, and allowed it to be consolidated with and absorbed in the suit instituted by C. V. Woodruff & Co. vs. The United States, (Record, p. 24, marginal p. 43.)

It was understood that after the payment of the purchase money due on the said cotton in accordance with the

terms of the bill of sale of Elgee & Chambers, that C. S. Lobdell was to receive twenty cents a pound on the cotton taken and sold by the United States; that in accordance with this understanding all parties being in Court, (Charles S. Lobdell in *propria persona*,) Woodruff & Co. agreed, in open Court, that the Court should apportion the fund in suit among the parties found to be equitably interested therein. (Record, p. 24, marginal page 43.)

Should the judgment rendered in this case now be reversed, Lobdell will practically be out of Court, and if the case should go back to the Court of Claims for further proceedings, he would have no standing in it in order to protect his rights. After the solemn agreement made by Woodruff & Co. in open Court, will the Supreme Court allow them to ask for a reversal thereof to the prejudice of his rights?

It will be observed that Lobdell did not sell the cotton, he sold his contract with Elgee and Chambers, and especially stated that it was a contract for twenty-one hundred bales, and Woodruff & Co. stipulated in Lobdell's contract with them to pay to Elgee and Chambers one hundred thousand dollars. This purchase was made with the understanding that it was burdened with the payment of the purchase money, and that they could not get possession of the property until they had paid it. It was, however, provided that if the cotton fell short of the twenty-one hundred bales, that the sum to be paid was to be estimated upon the quantity received at the rate of ten cents per pound to Elgee & Chambers, and twenty cents a pound to Lobdell. When this cotton was burned, after the Government had taken five hundred and seventy-two bales, Woodruff & Co.'s contract was at an end. When they accepted of the assignments of C. S. Lobdell, for the purpose of prosecuting a suit for his benefit, they simply undertook to do what Lobdell had bound himself to do in the bill of sale to himself. It is not probable that Woodruff & Co.

would have undertaken to have prosecuted this suit and paid the purchase money, if they had not seen that it would have been for their benefit; and in undertaking to do this, it will be admitted, that to the extent which Lobdell is entitled to realize from the proceeds of the cotton under his purchase from Elgee & Chambers, Woodruff & Co. are entitled to a specific performance, but beyond that there can be no other claim. Lobdell cannot be asked to pay the purchase money, and then to allow Woodruff & Co. to receive the balance of the proceeds. It is not contended, nor will it be, that Lobdell under the circumstances is liable for the inexecution of the contract. To hold otherwise would be inequitable. The bill of sale of Lobdell to C. V. Woodruff & Co. is to be interpreted by the principles of equity and usage as well as of law.

"The object of a contract must be possible, by which is meant physically or morally possible. The possibility must be determined not by the means or ability of the party, but by the nature of things." (La. C. C., Art. 1885.)

"Equity, usage and law supply such incidents only as the parties may reasonably be supposed to have been silent upon, from a knowledge that they would be supplied from one of these sources." (La. C. C., Art., 1959.)

"The equity intended by this rule is founded in the Christian principle, not to do unto others that which we would not wish others should do unto us, and on the moral maxim of the law that no one ought to enrich himself at the expense of another. When the law of the land and that which the parties have made for themselves by their contract, are silent, courts must apply these principles to determine what ought to be incidents to a contract which are required by equity." (La. C. C., Art., 1960.)

Where property is contracted to be sold and the seller is prevented from making delivery thereof to the purchaser, in consequence of a fortuitous event or irresistible force, he is excused from the performance of his contract, and no specific performance will be allowed the purchaser.

"2. When by a fortuitous event or irresistible force the debtor is hindered from giving or doing what he has contracted to give or do, or is from the same cause compelled to do what the contract bound him not to do, no damages can be recovered for the inexecution of the contract.

"3. There are two exceptions to the last rule; first, when the party in default has by his contract *expressly* or *implicity* undertaken the risk of the fortuitous event or of the irresistible force; secondly, if the fortuitous event or case of force was preceded by some fault of the debtor, without which the loss would not have happened.

"4. Although the responsibility of the debtor for the object he was bound to deliver is incurred from the moment he is put in default, yet if it is lost by some fortuitous event or irresistible force by which it would also have been lost had it been in the hands of the creditor, the debtor is not answerable for the value but only for the delay." (La. C. C., Art. 1927.)

"But if the object contracted to be given be not a thing particularly specified but is uncertain, indeterminate or described only by quantity or number, it is at the risk of the creditor only from the time he is in legal default for not receiving the thing after it has been tendered. A contract to deliver a certain number of bushels of wheat, to pay a certain sum of money, or to ship a certain number of hogsheads of sugar, without further identification, comes under this rule." (La. C. C., Art. 1909.)

"There is an exception to the rule established in the last preceding article; when the object of the contract although indeterminate in itself makes part of a whole that is determinate and certain, and the whole, of which it forms a part, is lost or destroyed by inevitable accident before delivery, the loss will fall on the creditor of the thing sold. A sale of ten bales, of the hundred bales of cotton in a particular store, is an example of this rule, and if all the cotton be destroyed by fire, the accident will discharge the seller from the obligation of delivery." (La. C. C., Art. 1910.)

"In the case provided for by the last article it must appear that the designation of the mass, from which the particular object of the contract is to be taken, was intended by the parties as restrictive, that is to say that their intention was confined to that *particular* property, and no other of the same kind. Where such intent is not clearly ex-

pressed, it shall be presumed that no such restriction was intended; and the thing is at the risk of the debtor until default." (La. C. C., 1911.)

Alling vs. Bach, 2 An., 746.
Waren & Crawford vs. Kirk, 24 An., 150.

In contracts it is oftentimes stipulated that a penalty shall be paid in case of a violation or a failure to comply with the terms of the contract. The Civil Code of Louisiana provides in such cases that

"The penalty being stipulated merely to enforce the performance of the principal obligation, it is not incurred, although the principal obligation be not performed, if there be a lawful excuse for its non-performance such as inevitable accident or irresistible force." (La. C. C., Art. 2116.)

The principle which applies to obligations contracted on a suspensive condition might be said to be pertinent in this case:

"If the thing be entirely destroyed without the fault of the debtor, the obligation is extinguished.

"If the thing be impaired without the fault of the debtor, it is at the option of the creditor either to dissolve the obligation or to require the thing in the state in which it is without diminution in the price." (La. C. C., Art. 2039.)

The contract of sale of C. S. Lobdell to Woodruff & Co. was made and executed in the city of New Orleans, in the State of Louisiana, and is therefore governed by the laws of that State as laid down in the Civil Code; and it will be seen from the principles of equity and justice as laid down by the articles of the Civil Code, that Woodruff & Co. are not entitled to a specific performance of that contract of sale beyond the proceeds of the 572 bales taken and sold by the United States; and since they prosecute for the benefit of C. S. Lobdell they can but be entitled to the balance of the proceeds, after fulfilling the terms of the sale between Elgee and Lobdell and Lobdell and Woodruff & Co.

The principles as laid down with reference to the sale of

Lobdell to Woodruff & Co. apply with equal force to the sale of Elgee & Chambers to Lobdell.

Lobdell asks that the judgment of the Court of Claims may be affirmed; that being a party in Court when the agreement and consent of Woodruff & Co. was made, if the judgment of the Court of Claims should be reversed and sent back, his suit having been absorbed as above stated, dropped or dismissed, he would not be in position to defend his rights or to prosecute his claim. He therefore insists that the judgment, as rendered, is the result of an agreement under solemnities which cannot be questioned, and which cannot be changed, and leave the parties in the same position that they were before the consent and judgment in the Court of Claims.

Respectfully submitted,

C. S. LOBDELL,
In *propria persona.*

UNITED STATES COURT OF CLAIMS.

CORNELIUS V. WOODRUFF and ADOLPH BOUCHARD
vs.
THE UNITED STATES.
No. 2157.

I certify that the suit of Cornelius V. Woodruff and Adolph Bouchard *v.* The United States, No. 2157, was first brought in the United States Court of Claims by a petition filed in said court on the 26th day of April, A. D. 1865; that on the 25th day of May, A. D. 1864, a motion to dismiss the aforesaid petition was filed; that on the 9th day of December, A. D. 1867, said petition was dismissed, a copy of which said petition is hereunto annexed; that said cause was, by order of court, reinstated on the general docket, January 6, 1868.

In testimony whereof, I hereto set my hand and affix the seal of said court, this 20th day of March, A. D. 1875. [L. S.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

IN THE COURT OF CLAIMS.

Cornelius V. Woodruff and Adolph Bouchard
vs.
The United States.
No. 2157. Filed April 26, 1865.

To the Honorable the Judges of the Court of Claims:

Your petitioners, Cornelius V. Woodruff and Adolph Bouchard, who are citizens of the city of New Orleans,

and State of Louisiana, respectfully represent to your honors: That prior to and in the month of March, in the year eighteen hundred and sixty-four, they were partners, trading and doing business in said city and State, under the name and style of C. V. Woodruff & Co.; that in said month of March, in the year last aforesaid, they owned and had in their possession, in the county of Wilkerson, in the State of Mississippi, about two thousand and one hundred bales of cotton, which cotton was then situate on a bayou on Buffalo creek, about three miles from the Mississippi river, and about sixty miles below Natchez, in said county and State last aforesaid.

Your petitioners further represent that in the month of ———, in the year eighteen hundred and sixty-four, they applied to R. S. Hart, Esq., special Treasury agent of the United States at said Natchez, for a permit to remove, carry, and transport their said cotton to New Orleans, and said Treasury agent granted them such permit; and your petitioners gave bond and complied in all respects with the regulations of the Treasury Department in such cases made and provided.

Your petitioners further represent that afterwards, and some time in the month of April, in the year eighteen hundred and sixty-four, one B. F. Camp, without the knowledge or consent of your petitioners, unlawfully took five hundred and seventy-two bales of the said cotton of your petitioners, and carried the same away from the place aforesaid, where the same had been left by your petitioners, in said Wilkerson county. And said B. F. Camp caused said five hundred and seventy-two bales of cotton to be laden on the steamboat Venango, and carried the said five hundred and seventy-two bales of cotton to Natchez, in said State of Mississippi, where said cotton, in said month of April, was seized and taken possession of by R. S. Hart, special agent of the Treasury Department of the United States.

Your petitioners further represent that the said R. S. Hart, the said Treasury agent, caused said 572 bales of

cotton to be carried and transported to the port of St. Louis, in the State of Missouri, and there, at the port and in the city of St. Louis, in the State last aforesaid, said Treasury agent caused said 572 bales of cotton, the property of your petitioners, to be sold; and said 572 bales of cotton, then and there, in the month of July, 1864, was sold by said Treasury agent for the gross sum of three hundred and forty thousand dollars; and said Treasury agent caused the said sum of money, the proceeds of the sale of said 572 bales of cotton, to be paid into the Treasury of the United States, where the said sum of money has ever since remained and now is.

Your petitioners further represent that, as owners of the said 572 bales of cotton, they are lawfully entitled to the said proceeds of the sale thereof, to wit, to the said three hundred and forty thousand dollars, received by the said Treasury agent, and paid into the Treasury of the United States as aforesaid, but which sum of money is wrongfully withheld from your petitioners by the United States.

Your petitioners further state that they are the sole owners of their said claim, and that they have at all times borne true allegiance to the Government of the United States, and they have not in any way voluntarily aided, abetted, or given encouragement to the rebellion against said Government.

JOHN H. RANKIN,
JOHN M. KRUM,
W. W. HANDLIN,
Solicitors for Claimants.

STATE OF MISSOURI,
City and County of St. Louis, } *ss.*

John H. Rankin, being duly sworn, deposes and says that he is attorney for said claimants; that he believes that the facts stated in the foregoing petition are true; that he believes that no assignment or transfer of said claim, or any part thereof, or any interest therein, has been made by said claimants; and that he believes that the said claimants are justly entitled to the amount claimed from the

United States, after allowing all just credits and offsets, as in said petition stated.

(Signed) JOHN H. RANKIN.

Subscribed and sworn to before me, this eighteenth day of April, 1865. BENJ. F. HICKMAN,
U. S. Com'r Mo. Dist.

5 cent Int. Rev. Stamp.

Address of claimants and counsel:
Adolph Bouchard, New Orleans, La.
Cornelius V. Woodruff, "
W. W. Handlin, Esq., Attorney, New Orleans, La.
Joseph M. Krum, Esq., St. Louis, Mo.
John H. Rankin, Esq., St. Louis, Mo.

IN THE UNITED STATES COURT OF CLAIMS.

TO THE OCTOBER TERM, 1865.

Cornelius V. Woodruff and Adolph Bouchard
vs.
The United States. } 2157.

The defendants come and move the court to dismiss this suit, and assign for reasons for said motion the following:

1st. Because this suit is instituted to recover the proceeds of certain captured or abandoned cotton, collected and sold under the provisions of the act of Congress approved March 12, 1863.

2d. Because it is provided in the third section of said act of Congress that the owner of any such captured or abandoned property "may, at any time within *two years* after the suppression of the rebellion, prefer his claim to the proceeds thereof in the Court of Claims."

3d. Because the rebellion referred to in said act of Congress is not yet suppressed, so as to give the claimants any right to maintain an action for the proceeds of said captured or abandoned cotton.

JOHN J. WEED,
Assistant Solicitor for the United States.

Filed May 25, 1865.

At a Court of Claims, held at the Capitol, in the city of Washington, on Monday, the 9th day of December, A. D. 1867:

Woodruff and Bouchard
vs.
The United States. } No. 2157.

And other causes.

Ordered, That the rule heretofore granted to show cause why the above cases should not be dismissed for want of prosecution be made absolute, and the several cases be dismissed.

BY THE COURT.

At the Court of Claims, held at the Capitol, in the city of Washington, on the 6th day of January, A. D. 1868:

* * * * * *

Woodruff and Bouchard
vs.
The United States. } No. 2157.

On motion of Mr. Corwine, this case, dismissed on the 9th day of December last, was reinstated on the general docket.

BY THE COURT.

IN THE COURT OF CLAIMS, WASHINGTON, D. C.

I certify that the foregoing are true transcripts from the records of the Court of Claims in the aforesaid cause of Woodruff and Bouchard *v.* The United States, No. 2157.

In testimony whereof I hereunto set my hand and affix the seal of said Court of Claims this 20th day of March, A. D. 1875.

[SEAL.]

JOHN RANDOLPH,
Ass't Clerk Court of Claims.

Supreme Court of the United States.

BESSIE ELGEE GAUSSEN
vs.
THE UNITED STATES. } No. 143.

Memoranda of Cases cited in the Opinion of the Court of Claims.

The opinion of the Court of Claims held "that the ownership is made up of two rights, viz, the right of property and the right of possession, and these rights are so distinct that they pass by different means and at different times; and in every case they are in different persons at the same time. The right of property passes first and by the mere agreement of the parties in the contract of sale. The right of possession passes afterward, and by the delivery of the thing sold on payment." (7, N & H., 615.) That when the subject of sale is a single or specific thing the right of property passes by mere agreement. Where it is not specific, but remains to be separated or ascertained, then the property does not pass. When the whole of a quantity is the subject of sale, then the thing sold is specific, and the property passes on the agreement of sale, as is the case of a horse or ship, even though it have to be weighed to ascertain the price, because the weighing is immaterial to the specification of the thing sold. And that as to the contract, the intent of the parties determined whether the property passed.

The following is a synopsis of the cases cited by the court:

1. Crofoot *vs.* Bennett, 2 Comstock, N. Y., 258.

Crofoot sued Bennett in the Supreme Court in trespass for taking bricks.

Crofoot, plaintiff, sold Bennett, defendant, 43,000 bricks to be taken out when burnt, from a kiln then being put up on the plaintiff's yard, and gave defendant possession of the yard; and further, after bricks were burnt gave him a bill of sale of all the bricks in said Kiln. Defendant took out of the said kiln 43,000 bricks. *Held* by the court below that these facts made out a good delivery of the bricks to defendant, and as against him plaintiff had no title, and verdict for defendant.

"Chief J. It is said in the *opinion* of the Supreme Court that the title to the unburnt bricks passed to the defendant before they had been separated. In this I think they were wrong. Chancellor Kent says that 'where the goods sold are mingled with others they must be ascertained, designated, and separated from the mass before the property can pass.'"

He proceeds to enforce this, and then says: "But if the goods be clearly identified then, although it be necessary to number, weigh or measure them in order to ascertain the price of the whole at a rate agreed on between the parties, the title will pass."

But he goes on to say the case will not be reversed for that error because there was a delivery of the whole kiln, with the privilege of selection, the final delivery of the yard carried with it the possession of the bricks. "The defendant had thereupon made out a full defense to the plaintiff's action as was correctly decided by the judge, and although he may have placed the decision on different and possibly insufficient grounds, yet if the judgment was right it should not be disturbed."

2. Turley *vs.* Bates, 2 Hurlston & Coltman, 200.

Action by plaintiff, against defendant, upon a special count and also for goods bargained and sold and for goods sold and delivered.

Plaintiff sold defendant a heap of fire clay to be removed from plaintiff's land, (which he wanted cleared,) by defendant at his own cost, to be weighed by defendant as he hauled it away, at a machine on the way to defendant's works, and to be paid for at two shillings per ton.

Defendant took away and paid for part and refused to take the rest, Verdict for plaintiff. On the rule to show cause counsel for plaintiff admitted that when anything remained to be done the title did not pass, but contended that when everything had been done by the seller that he was bound to do, and nothing remained for the buyer but to come and take away his goods, the title had passed and was in him. Cited Blackburn on Sales, p. 157.

The court cite the rule in Blackburn on Sales p. 15, and after reviewing the cases cited by Blackburn in support of this rule, say:

"From a consideration of these cases it appears that the principle involved in the rule above quoted, is that something remained to be done by the seller. It is therefore very doubtful, as before stated whether, the present case comes within the prohibition of the rule.

The bargain held binding, as it was for the whole heap, and nothing was to be done before removal.

3. Kershaw *vs.* Ogden, 3 Hurlstone, 717.

Assumpsit for not accepting goods, for goods bargained and sold, and goods sold and delivered.

Defendant bought four specific stacks of cotton waste, to be packed by his own packer in his own packages, and taken away in his own carts and paid for at 1s 9d a pound.

Defendant sent his packer with sacks, packed the whole four stacks into eighty-one sacks, twenty-one sacks were

weighed and carried off in defendant's carts, and soon after returned as being inferior to that purchased.

"The judge left it to the jury to say whether under all the circumstances, the defendants did accept and actually receive part of the cotton waste; if so, the plaintiff was entitled to the verdict."

The jury found in the affirmative, and a verdict was entered for the plaintiff for £784 on the count for goods bargained and sold, "leave being reserved to the defendants to move to enter a non-suit."

The only point made by the defence was that "there was no evidence of a contract binding on the defendants within the 17th section of the statute of frauds. There being no part payment or any note in writing of the bargain, the plaintiff can only succeed by having an acceptance and actual receipt of part of the goods.

Pollock, C. B.: I am of opinion that the rule ought to be discharged. I think this case is not distinguishable in principle from Trurley *vs.* Bates, 2 H. and C., 200, and that it was a question for the jury, what was the character of the transaction. The delivery of the goods to the defendants, the packing and removing them in the defendants' carts to their premises, and when they were returned to the plaintiff, his replacing them in his warehouse. The jury have decided as the result of all these facts that there was an acceptance and actual receipt of the goods by the defendants, and now I see no reason to question the propriety of their finding. In my opinion, the decision of the learned judge was perfectly right, and as he is not dissatisfied with the verdict the rule must be discharged.

4. Young *vs.* Matthews, 2 L. R. C. B., 127. M. being indebted to N., sold to him 1,300,000 bricks, and made an invoice of them, and gave an order to his foreman to deliver the bricks to N. The foreman pointed out three clamps, one containing burnt bricks, one burning and one unburnt, and in answer to his inquiry promised to hold

and deliver the said quantity of bricks to N. N. afterwards sold the bricks to defendant, who removed them from the field, and M, becoming bankrupt, his assignees brought trover for their value. Verdict for defendant, with leave to move.

"Erle, C. J. I am of opinion that there should be no rule in this case. The question is whether the property in the bricks passed to Northern or not, and in determining this we are to look at the intention of the parties. It is very material that Northern had made large advances to Moxen, and when the latter became embarassed he might well wish to have all he could appropriated to him. The well-known rule that the property does not pass to the buyer while anything remains to be done by the seller, either to complete the goods or to ascertain the price, does not therefore apply to the present case. There is no doubt that the parties could pass the property in all the bricks whether finished or not, if such was their intention; and what passed amounted to this: Northern's agent said, 'Are all these appropriated to my principal?' And the seller's agent said, yes.

5. Calcutta & Burmah S. N. Co. *vs.* De Mattos, 32 L. J. Q. B., 322. De Mattos agreed to deliver to the company 1,000 tons of coals at Rangoon, to be selected and shipped from England, to be insured for half their value, and the policy and bill of lading to be delivered to the company, on receipt of which the company were to pay half the price, and the balance was to be paid when coals were delivered by a bill on London.

"By the terms of the contract the vendor was bound to make such a contract, with the shipowner that he should have no lien for his freight as against the purchasers."

Coals were shipped and all conditions complied with as to insurance and bill of lading, but the ship was damaged on the voyage, lost some of the coal, had to tranship the

rest into a vessel which proceeded to Rangoon, but which refused to deliver the coal unless the company would pay the freight in cash. This was refused, and coal was sold by shipmaster; action was brought by the company to recover the advance paid and damages for non-delivery, and by De Mattos to recover the balance of the price.

All the judges agreed that the property had passed to the company, but were divided as to the effect of that fact on the further terms of the contract.

But the ground on which they decided that the property had passed, was that the shipowner had relinquished his lien for freight and that by the delivery of the bill of lading to the company's agent, the absolute control of the coals passed to the company, discharged of any lien by any one.

"Blackburn, J. As soon as De Mattos, in pursuance of these specifications gave the company the policy and the bill of lading, he irrevocably appropriated to this contract the goods which were thus shipped, insured and put under the control of the company. * * * The bill of lading is handed to them so as to give them the actual *de facto* dominion over the goods, and to confer upon them the power of giving to a third party by sale or pledge of that bill, what that third party would believe to be a rightful dominion over the goods. * * P. 329."

"Cockburn, C. J. The coals when shipped were specifically appropriated to the company, The transfer of the bill of lading gave them dominion over the cargo and they could from that moment have disposed of it at their pleasure. It seems to me therefore that the coals became the property of the company, although De Mattos might be bound to deliver them at the place agreed to." p. 335.

"It appears to me, however, though certainly not without much hesitation and doubt, that the true construction of the contract is this: The contract being for the delivery of the coals at Rangoon, under ordinary circumstances the seller would not be entitled to the price till delivery of the

coals there. On the other hand the seller would not have been bound to part with the property or to hand over the shipping documents, the indicia of it, till the price was paid. The parties here, however, agree so far to modify the conditions which would attach on an ordinary sale contract for the sale of an article to be delivered at a given place, as that the seller, instead of waiting till the price is paid, shall at once pass the property, and on the other hand the buyer, instead of waiting for the delivery of the goods, shall, on having the property transferred to him at once, pay a portion of the price, the amount to be protected by a policy of insurance." p. 336.

6. Gilmour *vs.* Supple, 11 Morris, P. C., 551.

Supple having a raft of timber at Carouge, on the St. Lawrence river, sold the same to Gilmour, to be delivered at Indian Cove, some miles below on the river, at 7¾ *d.* per foot; terms, one-third cash, one-third sixty days, and one-third ninety days. The raft had been measured by the Supervisor of Cullers, an officer appointed under a statute. The cash payment was made. The raft was towed down to Indian Cove, where the purchaser had booms, but before being secured was almost destroyed by a tempest. Supple sued to recover the residue of the price.

The judge left it to the jury to decide as a fact whether there was a delivery to Gilmour, and that if they were satisfied there was an actual taking possession by him, the seller was entitled to recover. Pp. 555, 6.

The jury found that the raft had been delivered and received, and rendered their verdict for plaintiff. P. 557. And judgment with leave to move for new suit.

The defendant moved on the ground that something remained to be done to ascertain the price, viz., measuring the lumber, and that in such case there *could be* no delivery or acceptance.

Sir Cresswell Cresswell stated the rule thus: "By the

law of England, by a contract for the sale of specific ascertained goods, the property immediately vests in the buyer and a right to the price in the seller, unless it can be shown that such was not the intention of the parties. Various circumstances have been treated by our courts as sufficiently indicating such contrary intention. If it appears that the seller is to do something to the goods sold on his own behalf the property will not be changed until he has done it, or waived his right to do it." Pp. 556, 7.

He then reviewed the facts of the case, and said that by the terms of the contract no further measurement was to be made; that a specification of the measurement of each log had been handed to the purchaser, and there was nothing from which it could be inferred that the seller was to make any further measurement, and he had no such privilege or duty; and after his servants had given up possession and defendants had taken it, he could not have reclaimed possession, either as his property or as having a lien on it for the price. Moreover, the usage was that neither party would have measured it at the place of delivery. "*There was then nothing to be done by the buyer in his own behalf;* he had ascertained the whole price of the raft by the measurement previously made; *nor was there anything to be done by him for the buyer;* the seller had, according to his contract conveyed the raft to Indian Cove, and then, according to the finding of the jury, had delivered it there; *nor was there anything to be done in which both were to concur*, as in Simmons *vs.* Swift. The case therefore depends upon the effect of a contract for the sale of certain ascertained goods without anything to limit or contract its legal operation." (Pp. 575, 572.